

REPORTS OF CASES
HEARD AND DETERMINED
BY
THE JUDICIAL COMMITTEE
AND
THE LORDS
OF
HER MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL,
ON
APPEAL FROM THE SUDDER DEWANNY ADAWLUT
AND HIGH COURTS OF JUDICATURE
IN
THE EAST INDIES.

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PRIVY COUNCIL,
ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,
FOR HEARING AND REPORTING ON APPEALS TO HER
MAJESTY IN COUNCIL.

1866-7.

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A

TABLE

OF THE

NAMES OF CASES REPORTED

IN THIS VOLUME.

	Page
Appovier v. Rama Subba Aiyar	75
Ashrufood Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan	94
Baboo Dhunput Singh v. Gooman Singh	433
Baboo Miheen Lall, Mussumat Cheetha v.	369
Baboo Rewun Pershad v. Jankee Pershad	25
Bannurdass Mukerjee, In re (Note)	3
Bhugwandeem Doobey v. Myna Bacc... ..	487
Busheer Khan, Meethun Bebee v.	213
Cavalry Vencata Narrainapah v. The Collector of Masuli- patam	619
Delhi, The estate of the Ex-King of Delhi, Lalla Narain Doss v.	277
Dhurma, Mussumat Mooneea v. (Note)	393
Eshenchunder Singh v. Shamachurn Bhutto	7
Gooman Singh, Baboo Dhunput Singh v.	433
Gopaulchunder Chuckerbutty, Sreemanchunder Dey v.	28
Goree Monee Dossee v. Juggut Indro Narain Chowdery	1

TABLE OF CASES REPORTED.

	Page
Greedharee Doss v. Nundokissore Doss, Mohunt	405
Gunga Gobind Mundul v. The Collector of the Twenty-four Pergunnahs	345
Guthrie v. Lister	129
Hyder Hossein Khan, Ashrufood Dowlah Ahmed Hossein Khan, Bahadoor v.	94
Jankee Pershad, Baboo Rewun Pershad v.	25
Jodonath Bose v. Shumsoonnissa Begum	551
Juggomohun Bukshee v. Roy Mothooranath Chowdry	223
Juggut Indro Narain Chowdery, Goree Monee Dossee v.	1
Katama Natchear, Zemindar of Shivagunga, Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v.	50
Lalla Narain Doss v. The estate of the Ex-King of Delhi	277
Lister, Guthrie v.	129
Maitland, Tareeny Churn Bonnerjee v.	317
Masulipatam, The Collector of, Cavaly Vencata Narrainapah v.	619
Meethun Bebee v. Busheer Khan	213
Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer	468
Mohun Lall, Thakoorain Sahiba v.	386
Moonshee Buzloor Ruheem v. Shumsoonnissa Begum	551
Mussumat Cheetha v. Baboo Miheen Lall	369
Mussumat Doolhin Badam Konwur, Seetul Pershad v.	268
Mussumat Jariut-ool-Butool v. Mussumat Hoseinee Begum	194
Mussumat Mohumdee Begum, Nawab Umjad Ally Khan	517
Mussumat Mooneea v. Dhurma (Note)	393
Mussumat Thakoor Deyhee v. Rai Baluk Ram	139
Mussumat Thakooranee Rutta Koer, Mohummud Zahoor Ali Khan v.	468

TABLE OF CASES REPORTED.

vii

	Page
Myna Baee, Bhugwandeem Doobey v. ...	487
Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum ...	517
Nugenderchunder Ghose v. Sreemutty Kaminee Dossee	241
Nundokissore Doss, Mohunt, Greedharee Doss v.	405
Rai Baluk Ram, Mussumat Thakoor Deyhee v. ..	139
Rajah Ameer Hussun Khan, Shah Koondun Lall v.	120
Rama Subba Aiyan, Appovier v. ...	75
Roy Mothooranath Chowdry, Juggomohun Bukshee v.	223
Ruttonji Edulji Shet v. The Collector of Tanna ...	295
Sectul Pershad v. Mussumat Doolhin Badam Konwur Shah Koondun Lall v. Rajah Ameer Hussun Khan	268
Shamachurn Bhattu, Eshenchunder Singh v. ...	120
Shumsoonnissa Begum, Jodonath Bose v. ...	7
Shumsoonnissa Begum, Moonshee Buzloor Ruheem v.	551
Sreemanchunder Dey v. Gopaulchunder Chuckerbutty	551
Sreemutty Kaminee Dossee, Nugenderchunder Ghose v.	28
Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar, Zemindar of Shivagunga ...	241
Sunduloonissa Chowdranee, Wise v. ...	50
Tanna, The Collector of, Ruttonji Edulji Shet v.	177
Tareeny Churn Bonnerjee v. Maitland ...	295
Thakoorain Sahiba v. Mohun Lall ...	317
Twenty-four Pergunnahs, The Collector of the, Gunga Gobind Mundul v. ...	386
Wise v. Sunduloonissa Chowdranee ...	345
	177

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 Srinagar.
 CASES

IN
 THE PRIVY COUNCIL
 ON APPEAL FROM
 THE EAST INDIES.

GOREE MONEE DOSSEE, and others *Appellants,*

AND

JUGGUT INDRO NARAIN CHOW- }
 DERY, and others ... } *Respondents.**

*On petition from the High Court at Fort William,
 Bengal.*

THIS was a petition for leave to appeal from certain Orders and decrees of the Civil Judge and *Sudder Ameen* of the *Zillah Rungpoor*, affirmed upon appeal

18th June,
 1866.

* Present :—Members of the *Judicial Committee*—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Vaughan Williams.
Assessor :—The Right Hon. Sir Lawrence Peel.

It is incumbent upon a party applying for special leave to appeal, to set out in the petition a full statement of the facts and legal

grounds, to show that there is a substantial case on the merits, and a point of law involved, proper to be determined by the appellate Court.

A petition for special leave to appeal contained a general statement of the proceedings in *India*, and an averment that they were irregular and contrary to law. Such petition ordered to be dismissed or to stand over for amendment as being too general and vague.

On the amended petition, stating in detail the facts and specifically showing legal grounds of objection to the decrees and Order of the Court below refusing leave to appeal, special leave to appeal was granted.

1866.

GOREE
MONEE
DOSSEE
v.
JUGGUT
INDRO
NARAIN
CHOWDERY.

by the High Court of Judicature at *Fort William, Bengal*, which Court refused leave to appeal to Her Majesty in Council on the ground, as it appeared from the petition, that it was only a decision in a miscellaneous case, and not a final judgment, decree or Order, within the meaning of sec. 39 of the Charter, dated the 14th of *May*, 1862, constituting the High Court of the Presidency at *Fort William*, or the previous Order in Council of the 10th of *April*, 1838, relating to appeals.

The petition set forth the proceedings taken in *India* under a decree of the *Zillah* Court of *Rungpoor*, of the 26th of *June*, 1837, and in which the ancestors of the Respondents were interested, and stated generally the facts of the case, submitting that the proceedings and Order of the High Court refusing leave to appeal were irregular and contrary to law.

Mr. *Wood*, in support of the petition.

The LORD JUSTICE KNIGHT BRUCE:—

Their Lordships are of opinion, that the statements, both of law and fact, contained in the petition are of too general a character to enable them to judge of the propriety of granting the special leave to appeal prayed for. The petition, therefore, must be either dismissed, with liberty to present another petition, or stand over to amend the petition. In either case the facts alleged in the petition must be verified by an affidavit.

The petition was amended, and, after fully detailing the proceedings in the Courts in *India* and the decrees of the Principal *Sudder Ameen* and *Zillah* Judge of *Rungpoor* and the High Court,

alleged that the Petitioners, feeling aggrieved by the decrees, presented a petition for leave to appeal, which was rejected by the High Court (the Hon. *G. Loch* and the Hon. *F. A. Glover* present), the Court saying, "The Order passed on the petition of *Bamundass Mukerjee*, No. 265 of 1865, is applicable to this petition, which is rejected" (a). That

1866.
GOREE
MONEE
DOSSEE
v.
JUGGUT
INDRO
NARAIN
CHOWDERY.

(a) The judgment in the case of *Bamundass Mukerjee* referred to and set out in the petition was as follows :—

"This is an application for permission to appeal to the Privy Council against the Order of the High Court passed in the execution of a decree of the Privy Council. Notice was ordered to be issued to the opposite party to come in and show cause against this application within one month from the date of service of notice. Subsequently, both parties having appeared, and as the case involved a new point of considerable importance, it was ordered on the 26th August, 1865, to be brought up before the miscellaneous Bench of Judges. It accordingly came before the Court (present, Justices *Loch* and *Glover*) on the 13th September, 1865. Mr. Justice *Loch* delivered judgment and an Order was passed by this Court on the 27th April, 1865, confirming an Order passed by the Principal *Sudder Ameen* in execution of a decree for a sum above Rs. 10,000, and application is now made to the Court for permission to appeal to the Privy Council under section 39 of the Charter of the High Court. The words of the Charter quoted in support of the application are from any 'final judgment, decree, or Order' of the said High Court made in appeal. The words, no doubt, are very wide : we think that they are not intended to extend the privilege of appealing to the Privy Council in miscellaneous cases, or to alter the present rules which restrict an appeal to 'judgments, decrees, or decretal Orders.' In Regulation XVI. of 1797, the word 'judgment' was alone used, but, notwithstanding, parties had been allowed to send miscellaneous cases to the Privy Council : the practice was put a stop to in 1837 by a construction of the late *Sudder Court*, dated the 18th August, 1837, No. 1102. In 1838 an Order in Council was passed, bearing date the 10th April, issuing rules for the admission of appeals to the Privy Council ; and in the first of these rules we have the words 'judgment, decree, or decretal order,' all of which words, we think,

S. N. Das
Advocate High Court
Jammu & Kashmir

1866.

GOREE
MONEE
DOSSEE
v.
JUGGUT
INDRO
NARAIN
CHOWDERY.

the Petitioners were precluded by the practice of the Court and their interpretation of the Order, in Council of the 10th *April*, 1838, and of the Charter of the High Court, from obtaining the leave of such Court to appeal to Her Majesty in Council; that the value of the subject matter in the original decree of the 20th *June*, 1837, was, at the date of the judgment of the High Court sought to be appealed against, considerably in excess of Rs. 10,000, the appealable amount,

are intended to have one and the same meaning, viz., 'the judgment or decisions come to in a suit,' and that they do not refer to Orders passed in execution of a decree. Such has been the interpretation put upon the words by the public, for up to the present time no application has been made to submit miscellaneous appeals to the Privy Council through this Court since the rules of 1838 were promulgated. In the Charter of the High Court the same words are used, with the omission of the word 'decretal' before 'Order : ' no doubt it is a remarkable omission, but reading it with the assistance we have from the letter of the Secretary of State for *India*, of the 14th *May*, 1862, par. 37, we do not think that so material a change in the past practice of the Court as the permission to appeal from miscellaneous Orders would have been passed by without comment, when he notices very particularly the introduction of a section in the Charter allowing of appeals from interlocutory Orders with the permission of a Judge of the High Court. In the paragraph of the letter referred to it is distinctly stated, that in regard to appeals to the Privy Council the object has been to avoid unnecessary innovation; that the existing rules which regulate these appeals are, therefore, left in force, with one or two additions only; and the writer proceeds to instance the introduction of a section permitting appeals from interlocutory Orders: and we think that there is a very great and sufficient reason why an appeal from Orders passed in execution of a decree should not be allowed, which is, that if allowed it would open a fresh door for harassing an Opponent who has already had to fight his battle perhaps up to the Privy Council, and deprive him of the power of executing his decree without further trouble and vexation. We think, therefore, that this and such like appeals cannot be received, and we reject the application."

the sum which was sued for in the original suit being Rs. 9,925, and the amount awarded by the decree being Rs. 5,800, with interest at the rate of 12 per centum per annum to the date of payment; that the grounds on which the Petitioners applied for special leave to appeal were, amongst others:—First; that the construction put by the High Court upon the Order in Council of the 10th *April*, 1838, and the Charter of the High Court was incorrect. Second; that by *Ben. Reg.* of 1814, and by the express terms of the Act, No. VIII. of 1859, ss. 207 to 217, it is rendered obligatory that applications for execution should be made to the Court which passed the decree; and it had been repeatedly adjudged by the Indian Courts, that applications for execution to a Court without jurisdiction were void, and, therefore, wholly insufficient to prevent execution being barred by limitation. Third; that the Indian law requires, in order to enable another Judge than the one who passed the decree to execute it, that an execution case should be referred to such other Judge by the Judge who passed the decree, and when such execution case has been struck off the file of the Judge to whom it has been referred, his jurisdiction is ended, and to revive it a new reference is required. Fourth; that according to decided cases of Indian law and the principles of jurisprudence, the process of a Court not having jurisdiction can in no case be legalized by the subsequent sanction of the Judge having jurisdiction, but new process must be issued. Fifth; that the proceedings in the Court of the Principal *Sudder Ameen* were, therefore, wholly void from the 19th *June*, 1844; and that, consequently, any money recovered thereunder was illegally exacted, and would

1866.

GOREE
MONEE
DOSSEE

v.

JUGGUT
INDRO
NARAIN
CHOWDERY.

1866.
 GOREE
 MONEE
 DOSSEE
 v.
 JUGGUT
 INDRO
 NARAIN
 CHOWDERY.

not prevent the operation of the rule of Limitation; and that under the old law of Limitation the execution is void. Sixth; that the execution was also barred, under the provisions of the Act, No. XIV. of 1859, ss. 20 and 21, no proceedings having been taken in a competent Court within three years from the passing of that Act. Seventh; that the decision contained in the judgment of the High Court was at variance with both previous and subsequent decisions of the *Sudder* and High Courts respectively, and if unreversed would cause great uncertainty and confusion as to the limits of the jurisdiction of the inferior Indian Courts, and also as to the law of Limitation of executions, and the construction and operation of the Acts hereinbefore referred to, which it is of the greatest importance to have accurately defined, maintained, and settled; and prayed for special leave to appeal from the decrees of the Civil Judge and the Principal *Sudder Ameen* of the *Zillah Rungpoor* of the 9th of *June*, 1864, and the 22nd of *June*, 1864, and also from the decrees of the High Court of Judicature at *Fort William* in *Bengal*, of the 9th of *January*, 1865, the 29th of *April*, 1865, and the Order of the 13th of *September*, 1865, rejecting the petition of special appeal.

3rd Nov.
 1866.

Upon this amended petition special leave to appeal was granted.

ESHENCHUNDER SINGH ... *Appellant,*

AND

SHAMACHURN BHUTTO, KOILASCHUN-
DER SINGH, and others } *Respondents.**

*On appeal from the High Court of Judicature at
Fort William, in Bengal.*

THIS was a suit for specific performance of an agreement brought by the Respondents, the *Bhuttos*, against the Appellant and the Respondent, *Koilaschunder Singh*. The object of the suit was to recover possession of a four *annas* undivided share of a *Putnee Talook*, called *Mouzah Balooka*, and *Mouzah Sreerampoore*, appertaining to *Pergunnah, Ookra*, the *Zemindary* of the Respondent, *Sutteeschunder Roy Bahadoor* (usually designated as the *Maharajah of Kishnagur*), and to have a deed of conveyance of

2nd & 3rd
Nov. 1866.

A decree of the High Court of Judicature at Calcutta was founded on an assumed state of facts, contradictory to the case alleged in the plaint and of the evidence adduced in support of it; upon appeal such decree reversed with costs. The Judicial Committee holding (1) that it

° Present :—Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams.

Assessor :—The Right Hon Sir Lawrence Peel.

was incorrect to conclude parties by inferences of fact, not only inconsistent with the allegations in the plaint, constituting the case the Defendants had to meet, but which were in reality contradictory to the case made by the Plaintiff in the Court below; and (2), that the legal conclusions deduced by the High Court were from assumed facts, which were not consistent with settled principles of law or equity.

1866.
 {
 ESHEN-
 CHUNDER
 SINGH
 v.
 SHAMACHURN
 BHUTTO.

the *Talook* executed in the Plaintiff's favour by the Defendants.

The plaint stated to the effect, that it was agreed between the Appellant and his co-Defendant, of the one part, and the late *Kistomohun Bhutto*, the father of the Respondents, *Shamachurn Bhutto*, *Kalichurn*, and *Bhowaneechurn*, and of *Oomachurn Bhutto*, deceased, of the other part, that the *Putnee* should be taken jointly by them from the *Maharajah*, the *Zemindar*, in the following proportions, viz., a twelve *annas* share by the Appellant and his co-Defendant, and the remaining four *annas* share by their father, at a certain annual rent of Rs. 756, exclusive of establishment expenses; the consideration being the sum of Rs. 11,000, payable to the *Zemindar*; and that an *Ekrar* (written agreement) to the above effect was executed on 15th *Kartick*, 1265 (31st October, 1858). The plaint then stated the cause of action to be that the Defendants, in violation of the terms of the *Ekrar*, had fraudulently got a *Putnee* lease executed in their own names on the 28th *Kartick* of that year, and has taken possession of the property; and had refused to make over to them the four *annas* share, or to take the consideration-money (*i.e.* the price payable to the *Zemindar*) for the same.

The *Ekrar* in question was filed with the plaint, and purported to have been signed by the Respondent, *Koilaschunder Singh*, alone. The translation of this instrument was as follows:—

“To the adorable *Kristomohun Bhutto*. I, *Koilaschunder Singh*, do hereby execute this *Ekrar* to the following effect:—It having been arranged between you and me that a *Putnee* settlement of *Mouzah*, *Balooka*, together with *Julkur* and *Tulkur*,

as well as all *Beels* and *Koothee*, &c., and *Mouzah*, *Srirampore*, on an annual rental of Rs. 756, exclusive of establishment expenses, will be taken by us, *i. e.* four *annas* share by you and twelve *annas* share by me, from the *Zemindar* of the said *Mehal*, the *Maharajah* of *Kishnagur*, for a consideration of Rs. 11,000; I have paid to the said *Maharajah* a sum of Rs. 2,000, in the shape of earnest-money, and have got a '*Byna Puttro*' executed in my favour on the 12th *Kartick* of the present year. According to the terms of the '*Byna Puttro*,' the balance of the consideration-money must be paid on the 12th *Aughran* next. I do, therefore, promise by this agreement, that on your accompanying me in the presence of the said *Maharajah*, before the said 12th *Aughran*, with your four *annas* share of the consideration-money, namely, Rs. 2,750, and on paying the other expenses in proportion to your said share, we will get a joint deed of the *Putnee* executed. If, however, you do not pay the money within the prescribed time, then you shall have no claim to that share of the said *Mehal*; and if the *Maharajah*, according to the conditions of the *Byna Puttro*, execute a deed for the entire sixteen *annas* only in my name, and do not execute a *Putnee Pottah* specifying therein your share, still I will execute in your favour a separate deed after receiving from you your share of the consideration-money of the *Putnee*, and make you my co-sharer to the extent of four *annas*. If I wilfully refuse to do so, then this deed will be a deed of your purchase of the said four *annas* share of the *Putnee*, and you will take possession of that share of that *Mouzah* as *Putneedar*, and my objections against that will be rejected: for this purpose I execute this

1866.

ESHEN-
CHUNDER
SINGHv.
SHAMACHURN
BHUTTO.

1866.
 ESHEN-
 CHUNDER
 SINGH
 v.
 SHAMACHURN
 BHUTTO.

Ekrar. Dated 15th *Kartick*, 1265 B. S. Written by *Nilcomul Dutt*, inhabitant of *Balooka*. Witnesses—*Sree Haradhun Bose*, inhabitant of *Balooka*. *Sree Baneemadhub Ghosaul*, inhabitant of *Balooka*."

Koilaschunder Singh, by his answer, submitted first, that the *Ekrar*, on which the claim was based, was an agreement without any consideration; secondly, that it was a forgery, and moreover was neither drawn on a stamp nor registered; thirdly, that he got a *Byna Puttro* (earnest Bond or deed) executed by the *Maharajah* to take the property claimed, in *Putnee*, with or by means of his brother's (the first Appellant) self-acquired money; and fourthly, that the money belonged to his brother; but that nevertheless, as he (*Koilaschunder*) was living in commensality with him, was entitled to a share therein.

The answer of the Appellant stated, first, that he sent *Koilaschunder* as his Agent for negotiating the *Putnee* settlement, which he wanted to take for himself with his own funds, consequently he had no power to dispose of any part of the same; secondly, that *Koilaschunder* got the *Byna Puttro* executed in his own behalf, with the object of getting a share of the property; that when he came to learn of this, he procured the cancelment of the same, and got the *Putnee Pottah* executed in his own name, and was then in possession of the *Putnee*; that *Koilaschunder* had no right or interest in the property in question; and thirdly, that the *Ekrar* propounded by the Plaintiffs was a fabrication; and even if it were genuine, he was not bound by it.

The Respondents, the *Bhuttos*, afterwards presented a petition in the suit, to the Principal *Sudder Ameen*, which stated, that the *Maharajah* having

taken the earnest-money, Rs. 2,000, from *Koilaschunder*, he executed the *Byna Puttro* in *Koilaschunder's* name; and that the *Maharajah* having, in contradiction to the terms and conditions thereof, executed a *Putnee Pottah* of the whole sixteen *annas* in favour of the Appellant alone, it was necessary to include the *Maharajah* in the suit. The petition then prayed that an Order might be passed for bringing in the *Maharajah* as a Defendant, according to secs. 29 and 73 of Act, No. VIII. of 1859. The Principal *Sudder Ameen*, on this petition, ordered the *Maharajah* to be made a Defendant. The *Maharajah* did not appear or file any answer in the suit.

The Appellant made a deposition in the suit, wherein he stated, that he carried on trade in *Calcutta* by means of money given to him by his Mother-in-law, and that he took the *Balooka Putnee* with that money, which was his self-acquired money, and none other had any right to it; that he, being absent in *Calcutta* sent the Rs. 2,000, as *Byna* through the Respondent, *Koilaschunder*, and afterwards went himself personally, with the remainder of the consideration-money, to the house of the *Zemindar*, and got from him the *Putnee* lease in question executed in his own name; and, lastly, that one *Birressur Mookerjee* was subsequently appointed his general *Mochtar*. In reply to a question put to him on behalf of the Plaintiffs, the Appellant stated:—"I am not aware whether any proposals about this *Putnee* were made or not between *Biressur* and Plaintiffs, *Shamachurn* and *Koilaschunder* before taking the *Putnee*." He then, after being questioned as to the handwriting of some letters, deposed as follows:—"My Brother *Koilaschunder* never mentioned to me about giving

1866.
 ESHEN-
 CHUNDER
 SINGH
 v.
 SHAMACHURN
 BHUTTO.

1866.

ESHEN-
CHUNDER
SINGH
v.
SHAMACHURN
BHUTTO.

the *Ekrar*: I know nothing about it. *Balooka* is my property, and I am in possession of it; neither did I send for and take the father of the Plaintiffs with me at the time of taking possession of the *Putnee Pottah*; nor was there any such condition that I should do so."

The Respondent, *Koilaschunder*, also made a deposition, wherein he stated that he never gave the *Ekrar*, nor signed it; that the *Putnee* was taken with *Eshenchunder's* self-earned money; and that before it was taken he had no proposals with any one about the *Putnee*; and that he did not go along with the Plaintiff to take the *Putnee*.

The Respondent, *Shamachurn Bhutto*, made a deposition after the above Defendant's two depositions had been taken. In that deposition he stated, that it was settled between *Eshenchunder Birressur*, *Mookerjee*, and himself, on the part of his Father, that the three should take the *Putnee* of the villages; that afterwards, at the time of making the *Putnee* settlement, he and *Koilaschunder* went to the *Maharajah's* house and settled, as above in the plaint alleged; but he admitted, that the earnest-money, Rs. 2,000, was paid by *Koilaschunder*, and also that the *Byna Puttro* (earnest Bond or deed) was taken in the name of the latter alone from the *Maharajah*; and also that the *Ekrar* was not executed until two or three days after the execution of the above *Byna Puttro*. He then proceeded in his deposition as follows:—
"A long time before the expiration of the period allowed in the *Byna Puttro*, *Eshen* and *Koilas* (meaning this Appellant and the above Respondent) went to the *Rajbatty* (the house of the *Maharajah*) and got a *Pottah* of the entire 16 *annas* executed in

the name of *Eshen*, by paying the consideration-money. This was done without my knowledge. This just having come to my knowledge, I remitted the consideration-money to my Father for payment to *Eshen* and *Koilas*, in accordance with the condition of the *Byna Puttro* and *Ekrar*. I am personally acquainted with these facts only; but subsequently I have learned that my Father went to the house of *Koilaschunder* and the *Maharajah* with money, and requested them to execute the deed; that they, however, having refused to execute the deed, the said money and the *Ekrar* were produced before the Judge in the Court. The Judge notified this fact to the *Singhs*, Defendants by an *Etlah* (notice)." To a question put by the Court, he said that the money was offered within the period limited in the *Byna Puttro*; and to a question put by the Pleader of the Appellant, in order to show that there was no consideration for the alleged *Ekrar*, he answered that when the first proposal was made between herself, *Eshen*, and *Birressur Mookerjee*, no question with regard to the money was raised.

In addition to the depositions of the parties to the suit, they respectively adduced evidence. The Plaintiffs produced certain documentary proofs, consisting of a Proclamation of the Judges of the Civil Court of *Zillah Nuddea*, dated the 26th of *November*, 1858, which recited a petition of *Kristomohun Bhutto*, since deceased, in which a different story was told respecting the alleged proposal on the part of *Koilaschunder*, the above Respondent, and the above-named Respondent *Shamachurn Bhutto*, to buy the *Putnee* aforesaid, stating that it was to the effect that he and the Petitioner, *Kristomohun* (only),

1866.

 ESHEN-
CHUNDER
SINGH

 v.
SHAMACHURN
BHUTTO.

1866.

ESHEN-
CHUNDER
SINGH

v.

SHAMACHURN
BHUTTO.

should jointly take the *Putnee*, and not averring in any part of the petition that the Appellant had ever been a party to the alleged proposal, or was in any way privy to it; but only alleging that before the Petitioner had gone to *Koilaschunder* and the *Maharajah* about getting the *Putnee* in the last-mentioned joint names, he, *Koilaschunder*, and the Appellant had gone together and paid the balance, and caused a *Pottah* to be executed in the name of the Appellant; and also a petition of the Appellant, in answer to the last-mentioned petition of the Plaintiffs recited in the Proclamation. In that petition the Appellant again insisted that *Koilaschunder* had no right or interest in the *Putnee*; that the Petitioner had not been able even to allege that the Appellant had entered into any engagement to give him a share; that there was no reason or object shown for *Koilaschunder* gratuitously executing an *Ekrar*, the Appellant too, having paid the earnest-money, unless it was the object of *Koilas* to fraudulently set up at some future time a claim to a share of the Appellant's self-acquired property, and so far act in collusion with the above-named Respondent, *Shamachurn Bhutto*, who was stated to be a Pleader of the Civil Court of *Moorshedabad*: also a petition of *Koilaschunder*, filed in answer to the before-mentioned petition and Proclamation, in which he denied that he had bound himself by any engagement to deliver to *Bhutto* the four *annas* share of the *Putnee* aforesaid; and stated that he did not execute the *Ekrar*; and denied that he acted in collusion with either *Bhutto* or his son.

Witnesses were examined. The first stated, that at the time when the *Ekrar* was executed the Appel-

lant was not present, and that he was resident in *Calcutta*, where his employment was, and that he could not say whether the *Ekrar* was executed by *Koilas* with the consent of the Appellant. The two other witnesses to the *Ekrar* did not say anything to show that the Appellant was in any manner an assenting party to the execution of the *Ekrar*. The other witnesses spoke to different matters, and, amongst others, to some conversations between *Koilaschunder* and the Plaintiff, *Shamachurn Bhutto*, but at the same time proved that the money was a part of this Appellant's self-acquired property, but failed to prove anything which could show that the Appellant was in any manner bound by the *Ekrar*, or by anything *Koilaschunder* might have said or done; or in any other manner that the Appellant had ever agreed to give *Kristomohun Bhutto*, deceased, any share in the *Putnee*.

The hearing of the suit took place before the Principal *Sudder Ameen* of *Zillah Nuddea* on the 17th of *February*, 1862, when a decree was made, dismissing the suit, with costs to the Appellant, who was to recover his costs from Plaintiffs; but the other Defendant was ordered to pay his own costs. In the judgment delivered at the hearing, the points for determination were stated by the Principal *Sudder Ameen*, who found and declared, that the *Ekrar* was executed by *Koilaschunder*, but that the Plaintiffs were not entitled to get a conveyance or possession of the disputed four *annas* share on the strength of that *Ekrar*, for the following reasons:—first, because there was no lawful consideration for the *Ekrar* which was received by Plaintiffs from *Koilas*, the same having been made gratuitously; second, that

1866.

ESHEN-
CHUNDER
SINGH

v.
SHAMACHURN
BHUTTO.

1866.

ESHEN-
CHUNDER
SINGH

v.

SHAMACHURN
BHUTTO.

it was clear from the depositions of Plaintiffs' own witnesses, that the *Putnee* was taken by *Koilas* on behalf and with the money of the Appellant, and that the latter was not bound by the act of *Koilas*; third, that the Plaintiffs were aware that *Koilas* was merely a nominal purchaser, and that he had made the bargain for the Appellant, and that the *Ekrar* was taken by Plaintiffs under those circumstances; fourth, that there was not sufficient evidence to show that the Plaintiffs were ready to pay the consideration-money (namely, the price of the *Putnee*) within the period specified in the *Ekrar*, but that it was not necessary to take the matter into consideration, for, as had been already shown, the Plaintiffs' claim fell to the ground: and it was declared that the *Maharajah* was not bound to the Plaintiffs, he being no party to the agreement.

The Plaintiffs appealed from this decree to the Judge of *Zillah Nuddea*.

The hearing of the appeal took place on the 12th of *December*, 1862, before Mr. *Rivers Thomson*, the *Zillah* Judge, when a decree was made affirming the decree of the Court below, and dismissing the appeal with costs. The Judge stated, that he had examined the *Ekrar* and found that it bore no stamp, and it was a question whether it could be received in Court; but, waiving that point, it was clear from the document itself, and also from the plaint, that one of the conditions essential to the validity of an agreement was wanting, namely, a consideration in law; that *Koilaschunder* did nothing more than promise, and that he had broken his promise, which he was bound to by a voluntary obligation merely, and that as no legal consideration was moving from the Plaintiffs; it was only

binding in honour, and did not impose any legal responsibility; and that, therefore, the *Ekrar* was void in law, and could not be enforced in the suit against Defendants.

The Plaintiffs brought a special appeal in the High Court of Judicature at *Fort William* against this decree. The hearing of the appeal came on before Messrs. *Kemp* and *Campbell*, two of the Judges of that Court, on the 4th of *August*, 1863, when the Court delivered the following judgment:—"In this case it is found that certain *Putnees* being offered for competition, the Plaintiff and the Defendant, *Koilas* (the Respondent), appeared to bid; but they then agreed that, instead of bidding against one another, they should take certain properties jointly. Accordingly, the properties were taken by the Defendant, and he shortly after executed a written agreement, binding himself to convey a quarter share of the *Putnees* to the Plaintiff. Subsequently, without any default of the Plaintiff's, he went before the time agreed on, paid the purchase-money, and had the *Putnees* registered in the name of his brother, *Eshenchunder*. The second Defendant repudiated his agreement with the Plaintiff. The Plaintiff now sues for specific performance of that agreement. The Judge, finding the facts as above stated, considered that the agreement was without consideration, and on that ground dismissed the Plaintiff's suit. But we think that abstaining from competition for the *Putnee* under the verbal agreement with *Koilas* was a sufficient consideration, and that this consideration affected and gave validity to the subsequent written agreement. The Judge's decision is, we think, opposed both to equity and to law. *Eshenchunder*

1866.

ESHEN-
CHUNDER
SINGH

v.

SHAMACHURN
BHUTTO.

1866.

ESHEN-
CHUNDER
SINGH

7.

SHAMACHURN
BHUTTO.

pleads that he is the real purchaser; that *Koilas* was only his Agent, and that he is not liable for *Koilas's* acts. But we think that, as the Plaintiff has accepted and been benefited by the act of his alleged Agent in respect to the purchase, he is bound by that Agent's stipulations in connection with the purchase, more especially as it does not appear that the agency was disclosed to the Plaintiff, but, on the contrary, it is clear that in his dealings with the Plaintiff, *Koilas*, acted himself as the purchaser. We, therefore, allow the appeal, reverse the decision of the lower appellate Court, and decree the Plaintiff's claim for specific performance of the written agreement."

The present appeal was brought from this decree.

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the Appellants.

This decree cannot be maintained. It proceeds and is based upon assumptions not found or declared as facts by, or proved in, the lower Courts, within whose province and jurisdiction the trial and finding of the facts exclusively lay, the High Court, on a special appeal, being confined to points of law merely. The plaint alleges an original agreement with *Esenchunder* as to a share or interest in the *Putnee*, but, first, there is no allegation of undisclosed agency, or, secondly, any allegation that what took place at the auction was not to be binding. That being so, what authority had the High Court to change the case by assuming a new equity, and adjudicate upon a case not alleged in the pleadings, and which we were not called on to answer.

Upon the merits we submit, that the Appellant was not in any manner bound by the *Ekrar* of the Respondent, *Koilaschunder*, which was voluntary, and without

consideration, and, therefore, not binding in law, and ought not to have been enforced in the suit. That instrument, moreover, contains no such terms or consideration as those referred to and relied on in the decree appealed from. No agreement containing such terms was proved; but, even if it had been, such were not contained in the *Ekrar*, declared and sued on by the Plaintiffs.

1866.

 ESHEN-
 CHUNDER
 SINGH
 v.
 SHAMACHURN
 BHUTTO.

Mr. *Piffard*, for the Respondents.

The objection to the finding of the High Court ought not to be sustained, as the Court can look at the whole record. [Lord WESTBURY:—Can you carry it so far as that? Can the High Court substitute a different state of facts not contained in the plaint, or the evidence in the Court below, and so introduce a new equity? If so, it would be a Court deciding questions of fact, whereas it has only jurisdiction to determine questions of law, on the special appeal.] The plaint alleges sufficient to warrant the judgment of the High Court. By the decree of that Court it was held, first, that abstaining from competition at the auction for the *Putnee*, under the verbal agreement with *Koilaschunder*, was a sufficient consideration, and affected and gave validity to the subsequent written agreement; and, secondly, that as the Appellant, *Eshenchunder*, had accepted and been benefited by the acts of *Koilaschunder*, he was bound by *Koilaschunder's* stipulation in connection with the purchase; and I submit that such decision was a just one, as it is manifest from the evidence that *Koilaschunder*, whose bidding was accepted by the *Maharajah*, and who secured the *Putnee* for the Appellant, *Eshenchunder*, induced *Shamachurn Bhutto* to desist from

1866.

ESHEN-
CHUNDER
SINGH

v.

SHAMACHURN
BHUTTO.

bidding against him by a promise that in case his *Koilaschunder's* bid should be accepted, it should be considered and treated as a joint bid for both parties, in the proportion of twelve *annas* and four *annas* respectively. The *Ekrar* put in evidence and relied upon by the Plaintiff was good evidence of such agreement, and was, moreover, not without consideration, but a valid contract resting on the same consideration as the original agreement. The agreement between *Shamachurn* and *Koilaschunder* being a valid agreement, *Eshenchunder* could not take advantage of *Koilaschunder's* acts without himself becoming subject to the obligations contracted by *Koilaschunder*. It appears, moreover, that *Koilaschunder*, in making the arrangement he made with *Shamachurn*, was in fact only carrying out the already expressed views and wishes of *Eshenchunder*, who before and at the time when he obtained the *Putnee* in his own name had notice and was fully cognizant of the contract made by *Koilaschunder* with *Shamachurn*. There was no default on the part of the Plaintiffs, or their ancestor; the money payable to *Koilaschunder* under the provisions of the *Ekrar* was tendered in due time.

The Right Hon. Lord WESTBURY :

This case is one of considerable importance, and their Lordships desire to take advantage of it, for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. Unfortunately, in the present instance the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated

in the plaint by the Plaintiff, and devoid not only of allegation, but also of evidence in support of it.

The case made by the Plaintiff alleges a distinct agreement between the Plaintiff and two brothers (whose names have been pronounced in a short manner—the one *Koilas* and the other *Eshen*), that the three should be joint purchasers and joint owners—owners in common, at all events—of a certain lease which was put up by a *Zemindar* to be taken by public tender at a particular time. The plaint proceeds upon the allegation that that lease was taken by *Koilas* on his own behalf, and on behalf of *Eshen*, and on behalf of the Plaintiff, and that, in conformity with the agreement between the three, *Koilas* subsequently executed an instrument for the purpose of giving effect to the agreement. The allegations, therefore, in the plaint are inconsistent with the hypothesis of *Koilas* having no interest and acting in the transaction as Agent only of *Eshen*. The plaint also proceeds upon a clear and well-defined ground of relief, namely, contract and agreement between the parties interested. The decision proceeds upon what is set forth as an equity resulting from the relation between *Koilas* and *Eshen* of principal and agent, and from the alleged fact of *Koilas*, in the execution of his authority, having given certain rights and interests to the Plaintiff without which his principal (*Eshen*) would not have been able to obtain the property in question. But the difference between the two grounds of relief and between the two kinds of case is plain.

The decision of the Court of First Instance, that of the Principal *Sudder Ameen*, of the 17th of *February*, 1862, found the facts of the case to be in direct contradiction to the allegations contained in the plaint.

1866.

ESHEN-
CHUNDER
SINGH

v.

SHAMACHURN
BHUTTO.

1866.

ESHEN-
CHUNDER
SINGH

v.
SHAMACHURN
BHUTTO.

It was found that *Koilas* had no interest at all; that the money paid to the lessor was not money in which *Koilas* had any interest or right; that *Koilas* acted from the beginning under the authority and as the Agent only of *Eshen*; that the contract was completed with the money of *Eshen*; and that there was nothing at all to show that *Eshen* in any manner was made aware of or was party or privy to the alleged transactions between *Koilas* and the Plaintiff. These facts being established by the judgment, and being, therefore, binding upon the High Court, which is not a Court at liberty to collect facts anew, it is very much to be regretted that the High Court should have departed altogether from the case made by the plaint, and should have founded their conclusion upon an assumed case wholly inconsistent with the recorded findings contained in the original judgment. That original judgment was the subject of an intermediate appeal, which, however, does not vary the matter, because the Judge of the first Court of appeal thought it right to dismiss that application and to affirm the original judgment.

We now come to consider the assumed state of facts, which is the basis of the decision of the High Court. The High Court takes it that *Koilas* was nothing more than the Agent of *Eshen*; but the High Court appears to have in some manner or other arrived at this conclusion, which does not appear to their Lordships to be warranted either by allegation or evidence, viz., that at the auction, or previous to the auction, there was an agreement between the Plaintiff and *Koilas* that the Plaintiff should abstain from bidding; and that, in consequence of that abstinence on the part of the Plaintiff, *Koilas*

succeeded in obtaining the estate at a less sum of money than otherwise he would have had to give; and that the Defendant, *Eshen*, took possession of the property with the knowledge of that transaction on the part of *Koilas*. It is obvious that every one of these propositions of fact is a statement which it was incumbent on the Plaintiff to have distinctly alleged, in order that it might be subject of direct testimony. It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the Defendant has to meet, but which are in reality contradictory of the case made by the Plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the Plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove.

It is unnecessary, therefore, to say that it is impossible for their Lordships to accept anything like those conclusions of fact as furnishing a *ratio decidendi* in the present case. Without adverting further to its being incompetent to the Court of appeal to substitute a new statement of facts for that originally contained in the record, their Lordships further observe that, even if the case substituted were admitted to be true, and to be the competent subject of judicial inquiry, the legal conclusion which is attempted to be derived from those facts is not consistent with the settled principles of law or equity. Supposing it to be the case that a man sends an Agent with direct authority and positive directions to bid at an auction and to purchase an estate, and the Agent

1866.

ESHEN-
CHUNDER
SINGH

v.

SHAMACHURN
BHUTTO.

1866.

ESHEN-
CHUNDER
SINGH

v.
SHAMACHURN
BHUTTO.

accordingly goes to the auction, and, in the execution of that authority, he does bid, and the estate is knocked down to him; but collaterally, and in a bye manner, he enters into a distinct and separate contract with an individual, that, in consequence of something to be done or to be forborne, he will pledge his principal to pay to that individual a certain sum; it is quite plain that, upon every consideration of justice, the principal cannot be bound by this bye transaction on the part of the Agent. If the Agent makes a contract on the part of the principal, having a definite authority, and he exceeds that authority by inserting a term in the contract itself, it would not be competent to the principal to say, "I will repudiate the inserted term in the contract, as being *ultra vires* and unauthorized, but I will obtain performance of the rest of the contract." In such a case, although the Agent had no authority for the additional term, yet, as it is an integral part of the contract itself, and the party selling was not aware of the want of authority, the principal could not enforce that contract without giving effect to the additional term. But, in the other case, the act of the Agent, if effect were given to it, would subject the principal not only to the contract which he authorized, and which he may be required by the vendor or lessor to fulfil, but also to an additional liability which he never contemplated.

Their Lordships are obliged to disapprove of the decision that has been come to by the High Court. They desire to have the rule observed, that the state of facts, and the equities and ground of relief originally alleged and pleaded by the Plaintiff, shall not be departed from; and they could not concur in the conclusion of law which has been drawn by the

Court below, even if they were at liberty to take into consideration the state of facts which that Court assumed.

Their Lordships, therefore, will advise Her Majesty to reverse the decree that has been appealed from, thereby confirming the original decree, and the decree of the *Zillah* Court; and to give the Appellant the costs of this appeal, the application to the High Court being directed to be refused with costs.

1866.

ESHEN-
CHUNDER
SINGH

v.

SHAMACHURN
BHUTTO.

BABOO REWUN PERSHAD ... *Appellant,*

AND

JANKEE PERSHAD ... *Respondent.**

*On appeal from the Sudder Dewanny Adawlut,
North-west Provinces, Agra.*

IN this suit, which was instituted by the Appellant against the Respondent in the Court of the Principal *Sudder Ameen* of *Zillah Allahabad*, the Appellant claimed certain property consisting of two villages,

* Present :—Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor :—The Right Hon. Sir Lawrence Peel.

14th Nov.
1866.

In a suit raising issues of fact, it did not appear from the record transmitted from *India* that the Judge of the *Zillah* Court

had, in conformity with Code of Civil Procedure, Act, No. VIII. of 1859, secs. 139, 140-1, settled or recorded the issues in the suit, although he allowed evidence in the cause to be taken. In such circumstances

1866.
 BABOO
 REWUN
 PERSHAD
 7.
 JANKEE
 PERSHAD.

judgment debts, bonds, and liabilities, estimated at Rs. 14,307, and also sought to set aside two several deeds of gift alleged to have been made by one *Mussumat Mithoo Bebee*, deceased, in favour of the Respondent. The Respondent, by his answer, denied the Appellant's right to the property, and submitted that the deeds of gift impeached were genuine. It did not appear in the record transmitted from *India* that the *Zillah* Court had settled and recorded the issues in the suit in conformity with the provisions of sections 139, 140, and 141 of the Code of Civil Procedure, Act, No. VIII. of 1859; it appeared, however, that the Principal *Sudder Ameen* had allowed evidence as to the validity of the instruments in question to be entered into, and dismissed the suit with costs; which decree, upon appeal to the late *Sudder Dewanny Adawlut* at *Agra*, was affirmed. Hence this appeal.

Mr. J. Anderson, Q. C. (with whom was Mr. Downing Bruce), for the Appellant, and

Sir R. Palmer, Q. C., Mr. Leith, and Mr. Bell, for the Respondent.

On the appeal being opened the Appellant's Counsel was stopped.

The Right Hon. Lord WESTBURY:

Observing, that the proceedings before the Principal *Sudder Ameen* appeared to be wholly irregular,

the Judicial Committee postponed the hearing of the appeal until a certified copy of the proceedings in the cause should be transmitted, and, in the alternative of no such issues being settled, set aside the decree of the *Sudder Dewanny* Court at *Agra*, with directions to that Court to remand the suit to the Lower Court, to be tried upon issues to be settled and recorded in conformity with the provisions of the Act, No. VIII. of 1859.

as he ought not to have gone into evidence without having first settled and recorded the points or issues in the suit, in conformity with the provisions of the Act, No. VIII. of 1859, which from the record transmitted did not appear to have done, and that in those circumstances the appeal must stand over for the production of the certified proceedings, in order to show whether this had been done, or, in the alternative, that the cause should be remitted back to *India* to be heard upon regular issues so framed.

By the Order in Council made thereon, it was ordered that the further hearing be postponed, and the High Court of Judicature for the *North Western* Provinces was directed to inquire and certify forthwith to the Registrar of the Privy Council whether the *Zillah* Judge did, in conformity with the provisions of Act, No. VIII. of 1859, settle and record any and what issues in the suit, and if so the Court was to transmit forthwith a copy of the proceeding in which such issues were recorded; and if no issues were settled and recorded, then it was ordered, that the decree of the late *Sudder Dewanny Adawlut* of the *North Western* Provinces at *Agra*, dated the 26th of *May*, 1862, be set aside, and that the High Court do remand the case to the *Zillah* Court, with directions that the suit be forthwith tried on issues there to be settled and recorded, in conformity with the provisions of the above Act, and to direct and hear evidence on such issues.

1866.

BABOO
REWUN
PERSHAD

v.

JANKEE
PERSHAD.

SREEMANCHUNDER DEY ... *Appellant* ;
 AND
 GOPAULCHUNDER CHUCKERBUTTY,
 DOORGAPERSAUD DEY, RUSSICK-
 LOLL DEY, and PROSONOMOYE } *Respondents.**
 DOSSEE

On appeal from the High Court of Judicature at Fort William in Bengal.

14th Nov.,
1866.

A. purchased a *Talook* at a sale, in execution of a decree obtained by a judgment-creditor. The Assignee of another judgment-creditor, who had obtained a decree in a separate suit against the estate, brought a suit against the purchaser

THE principal question in this suit and on appeal, was, whether the *Talook* known as Lot *Satgachia*, in the *Zillah* of *East Burdwan*, which had been sold in execution of a decree obtained against judgment-debtors, in a suit, No. 4 of 1857, was the property of *Gopaulchunder Chuckerbutty*, the first Respondent, or whether it was the property of the other Respondents, *Doorgapersaud Dey*, *Russickloll*

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor :—The Right Hon. Sir Lawrence Peel.

to set aside the sale, on the ground that the purchase was not *bond fide*, being made in collusion with the judgment-debtors. Held, on a review of the evidence, that there was not sufficient evidence to warrant the decree of the High Court at *Calcutta* that it was a *benamie* transaction ; or that the purchaser was acting as an Agent for the judgment-debtors ; and the decree of the Court below reversed.

Held further, that the *onus probandi* was on the Plaintiff to establish the affirmative issue that the money for the purchase of the *Talook* was supplied by the judgment-debtors, or a third party for them, and not by the purchaser. Evidence showing circumstances which may create suspicion is not enough to justify the Court making a decree resting on suspicion only.

On an appeal to the High Court, that Court, acting under the power conferred by section 355 of the Code of Civil Procedure, Act, No. VIII. of 1859, *ex mero motu* called for and examined fresh witnesses. Held that such power should be cautiously exercised, and the reasons for exercising it recorded or minuted by the High Court on the proceedings ; as, first, the witnesses may be such as the parties to the suit do not wish to call ; and, secondly, the new evidence may not be sufficiently extensive to satisfy the ends of justice.

Dey, and *Prosonomoye Dossee*, who was the widow and heiress of *Chundermohun Dey*, the judgment-debtors and made *benamee*, or in secret trust, in the name of the first Respondent in order to protect it from the creditors of the judgment-debtors.

The circumstances which gave rise to this question were as follows:—

In the year 1858, a *Talook* called *Lot Satgachia*, in the *Zillah* of *East Burdwan* in *Bengal*, whereof one *Sreenath Dey* was the ostensible owner, was put up for sale by auction, at the instance of one *Juggomohun Saha*, in execution of decree in a suit. No. 4 of 1857, against *Doorgapersaud Dey*, *Chundermohun Dey*, and *Russickloll Dey*, for whom the *Talook* had been held *benamee* by *Sreenath Dey*; when *Petumber Mookhopadhya*, or *Moorkerjee*, purchased it for Rs. 19,125, and paid into Court the deposit, amounting to Rs. 2,868. 12a., but being unable to pay the balance of the purchase-money, *Petumber Mookhopadhya* transferred the purchase to *Sreemanchunder Dey*, the Appellant, who repaid him the amount of his deposit, and having been substituted for him as purchaser, was let into possession of the *Talook*, and received a Bill of sale thereof in his own name.

Some time after taking possession the Appellant caused the estate to be measured, and he served notice upon many of the *Ryots* (including *Gopaulchunder Chuckerbutty*, the first Respondent) for increase of rent, and instituted suits to attach lands, which had been held as *La-khiraj*, or exempt from payment of revenue to the owner of the *Talook*.

The first Respondent subsequently took an assignment to himself from a judgment-creditor in another suit, No. 7 of 1861, against *Doorgapersaud Dey*, *Russickloll Dey*, and *Prosonomoye Dossee*, and he took

1866.

SREEMAN-
CHUNDER
DEY

v.
GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

1866.
 SREEMAN-
 CHUNDER
 DEY
 v.
 GOPAUL-
 CHUNDER
 CHUCKER-
 BUTTY.

out execution thereon against the judgment-debtors, *Doorgapersaud Dey* and *Russickloll Dey*, and also against *Prosonomoye Dossee*, and caused the *Talook* to be attached with a view of selling it in execution of the decree, as being their property, though held in the name of the Appellant.

The Appellant, on the 14th of *August*, 1861, filed his petition of claim in the Court of the Principal *Sudder Ameen* of the *Zillah* of *East Burdwan*, representing that the *Talook* was his own property, and praying that it might be released from attachment.

The Principal *Sudder Ameen*, after examining several witnesses on both sides, issued a *Perwannah* addressed to one *Gooroodos Dutt*, an *Ameen* for local investigation, requiring him to investigate through the inhabitants of the *Talook* itself, and villages contiguous to it, as to what party was then in possession of the *Talook*, and for how long, and in what manner.

The *Ameen* proceeded to the spot, when the decree-holder, the first Respondent, attended in person, and the Appellant (whose chief employment was in *Calcutta*) attended by his general Agent, and in their presence the *Ameen* took the depositions of several persons, including the Appellant. By his report, he stated, in effect, that the Appellant had shown in his examination such a want of acquaintance with matters connected with the *Talook*, as was inconsistent with the supposition that he was the real owner of it; that his ownership had not been established by the witnesses who deposed to it, but that other witnesses had proved that the *Talook* was in the possession of the judgment-debtors, who held it in the name of the Appellant.

This report was submitted to the Principal *Sudder*

Ameen (Nobinkishen Paulit), who pronounced judgment on the 16th of *November*, 1861, to the effect, that it was established that the Appellant had purchased the *Talook* ; had obtained a Bill of sale in his own name, managed all his suits ; and had also obtained *Kabooleats* from the tenants, and was personally in possession of the *Talook* ; and that the first Respondent had not been able to show that the judgment-debtors had paid the purchase-money, and caused it to be purchased in the name of the Appellant. Accordingly the Principal *Sudder Ameen*, under sec. 246, of Act. No. VIII., of 1859, ordered that the property should be released from sequestration, and the Appellant's application admitted ; and that the first Respondent, the decree-holder, should pay the Appellant's costs with interest, and that the Respondent's costs should be paid by himself.

On the 22nd of *November*, 1861, the first Respondent instituted a regular suit in the Court of the Principal *Sudder Ameen*, against the Appellant and the judgment-debtors, *Doorgapersaud Dey*, *Russickloll Dey*, and *Prosonomoye Dossee*, for the sale of Lot *Satgachia*, in execution of the decree in the suit, No. 7 of 1861 (the decree of which the first Respondent had become the holder for reversal of the above Order of the Principal *Sudder Ameen*, of the 16th of *November*, 1861), and for a declaration that such Lot was the property of the judgment-debtors. The plaint alleged that the judgment-debtors had purchased at auction, the *Talook* of *Satgachia*, *benamee*, in the name of the Appellant, and were still in possession thereof as proprietors.

The Appellant, by his answer, stated the circumstances under which he had purchased the property,

1866.
 SREEMAN-
 CHUNDER
 DEY
 v.
 GOPAUL-
 CHUNDER
 CHUCKER-
 BUTTY.

1866.

SREEMAN-
CHUNDER
DEY

v.

GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

and that he had, irrespective of anybody else, been in possession of the *Talook* as proprietor, and registered it in his name.

The principal *Sudder Ameen* fixed the following issue in the cause :—"Is the *Talook* that was released, by the summary decision complained of, the property of the judgment-debtors, and, therefore, saleable in reversal of the Order, or is it that of the Claimant, Defendant?"

The suit was afterwards removed to the Civil Judge of the *Zillah* of *East Burdwan*. Both parties entered into evidence. The testimony of the three principal witnesses for the first Respondent, *Nocoorchunder Gossamee*, *Ramtaruck Ghosamee*, and *Brojonaauth Bundopadhya*, was to the general effect, that the judgment-debtors had originally been proprietors of the *Talook*, and, although it had been repeatedly sold in execution, had contrived to buy it in the name of one Trustee after another; that on the last occasion, when, as they alleged, the secret trust was detected, and the *Talook* was sold at the instance of *Juggomohun Saha*, in execution of a decree against them, they had caused it again to be purchased on their own account in the name of the Appellant, whom these witnesses declared to be a very poor man, and nearly connected with the judgment-debtors, and that since his purchase, as also before it, the judgment-debtors had been in the habit of attending openly at the *Cutcherry* or business-room of the estate, where they received rent and openly exercised the powers of proprietors, although the receipts were given in the name of the Appellant. According to two of the witnesses, one *Moheschunder Dey*, a cousin-german of *Doorgapersaud Dey*, but not joint with

him, was also in the habit of attending at the *Cutcherry*, and he, as well as the judgment-debtors, received rents, and gave orders connected with the estate. They stated that when the *Talook* was sold in execution at the instance of *Juggomohun Saha*, *Moheschunder Dey* caused it to be bid for in the *benamee* name of *Petumber Mookhopadhy*, and afterwards, having no faith in *Petumber Mookhopadhy*, he caused it to be made *benamee* in the name of the Appellant. None of these witnesses alleged that he had any knowledge of the transaction at the time when it occurred. They admitted that the receipts for the rent were made out in the name of the Appellant. Evidence was given to show that *Moheschunder Dey* instructed *Petumber Mookhopadhy* to bid for the *Talook*, and advanced part of the deposit-money, which was paid into Court by *Petumber*, and which was afterwards repaid to him by the Appellant, and that *Petumber's* brother procured part of such deposit-money ; but no attempt was made to show that *Doorgapersaud Dey* or any of the judgment-debtors had anything to do with the money alleged to have been advanced by *Moheschunder*, or that the latter advanced the rest of the purchase-money, or to trace any portion of it to *Doorgapersaud*, or to any person except the Appellant ; or to show that the Appellant ever agreed to hold the *Talook*, *benamee*, or admitted that he did so hold it. Four witnesses were examined on behalf of the Appellant, and he was himself also examined. He deposed that the *Talook* was his own, and not held by him as *benamee* ; that he himself collected the rents by his *Gomastah*, and transacted all the business of the *Talook* ; he gave an account of his property and in-

1866.
 SREEMAN-
 CHUNDER
 DEY
 v.
 GOPAUL-
 CHUNDER
 CHUCKER-
 BUTTY.

1866.
 SREEMAN-
 CHUNDER
 DEY
 v.
 GOPAUL-
 CHUNDER
 CHUCKER-
 BUTTY.

come, and stated how he had paid the purchase-money of the *Talook* in Bank-notes, nearly all of which he received from his Bankers in *Calcutta*, representing cash at the Bankers and plate and jewels pawned to them.

The Appellant's account of the manner in which he had obtained the purchase-money was corroborated by a *Gomastah* in the service of the Bankers, who were related to the first Respondent, and was also corroborated by one *Jodoonath Dutt*.

The statements of the witnesses on behalf of the first Respondent were contradicted on many important points by the evidence adduced by the Appellant and by his own deposition taken in the suit.

The suit came on for hearing before Mr. *Pierce Taylor*, the Judge of the *Zillah* Court of *East Burdwan*, who, by a decree, dated the 10th of *March*, 1862, decided in favour of the first Respondent, assigning the following reasons:—First, because it was proved in the previous case of *Juggomohun Saha*, in 1858, that the judgment-debtors at that time held the disputed estate in the *Furzee* name of one *Sreenath Dey*, who was a distant connection of the (Claimant) Defendant, *Sreemanchunder Dey*, and both these facts had been acknowledged by the Defendant and his witnesses; second, because it had been proved by the Plaintiff, and not denied by the (Claimant) Defendant, that the latter is a distant connection of the judgment-debtors, and lives close to them in *Satgachia*; third, because it had not been proved by the (Claimant) Defendant's witnesses that he and the judgment-debtors were on bad terms, whereas the witnesses of the Plaintiff had solemnly declared the parties to be on good terms with each other, which would hardly

have been the case, if the (Claimant) Defendant, connection and neighbour of the judgment-debtors as he was, had actually purchased Lot *Satgachia* with his own funds ; fourth, because the Plaintiff's witness, *Gungagobind Mookerjee*, who was the brother of the late *Petumber Mookerjee*, the first bidder for the *Mehal*, has, though evidently from other parts of his deposition favourable to the interest of the (Claimant) Defendant, acknowledged that his late brother had in his opinion bid for the *Mehal* as *Furzee* for *Mohesh Dey*, a near connection of the judgment-debtors, and it had been proved that this witness paid part of the earnest-money for *Mohesh* ; fifth, because the near relationship of the *Mohesh* to the judgment-debtors had been acknowledged by the (Claimant) Defendant, and his witnesses, while they had failed to prove that there was any enmity between them ; sixth, because under such circumstances, and as the (Claimant) Defendant, declared himself to have been a most intimate friend of *Petumber*, it appeared quite unlikely that he would, for the first time in his life, have purchased a *Mehal*, in which he resided close to the former *Talookdar* thereof, with the knowledge that he must have had that the latter was endeavouring to purchase it through a *Furzee* ; seventh, because it was well known that no one but an enemy would prevent a former *Talookdar* from purchasing his estate back *benamee* at an execution sale, and it had been shown that the (Claimant) Defendant, could not afford to make the judgment-debtors his enemies ; eighth, because the (Claimant) Defendant, when examined on solemn declaration, had not been able to prove that he was, from the antecedents of himself and family, likely to have been rich enough to pawn

1866.

SREEMAN-
CHUNDER
DEYv.
GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

1866.

SREEMAN-
CHUNDER
DEY7.
GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

Rs. 8,500 worth of silver plate, gold ornaments, and diamond and pearl jewellery, for the obtainment of a portion of the money wherewith to purchase Lot *Satgachia*; ninth, because he had not been able to prove that the residual Rs. 9,000, he ostensibly paid, was his own money, and it was unlikely, for reasons before given, that he should have so much cash in his possession at the time of the sale; tenth, because the *Hath-chitta* said to have been singed by *Ramkanye Ghosaul* (meaning the document No. 17) for the money the (Claimant) Defendant took from him, was no evidence of that money being his; eleventh, because the great difficulty the Court had in getting the Plaintiff's unwilling witness, *Gungagobind*, before mentioned, to say whether he thought the (Claimant) Defendant, able to pay Rs. 19,000 for this estate, led to the conclusion that he must have been aware that he was unable to do so; twelfth, because the antecedents of the judgment-debtors, and the circumstances of the case warranted the conclusion, that if any ornaments were pawned with *Ramkanye* to *Bunkhobeharry* in *Calcutta*, and any money paid into their hands for the obtainment of Bank-notes, both must have been the property of the judgment-debtors, and that the negotiation regarding them was merely conducted by the (Claimant) Defendant; thirteenth, because the depositions of the (Claimant) Defendant's witnesses bore traces of instruction and collusion when compared with that of the (Claimant) Defendant, himself, whereas those of the Plaintiff's witnesses, who were respectable inhabitants of *Satgachia*, who must have known everything about it, were straightforward and credible, and supported by all the circumstances of the case, which were so much against the (Claimant) Defendant,

as to be almost sufficient to support a decision against him without any other evidence at all; and lastly, because the fact of the accounts and *Dakhillas* of Lot *Satgachia* being drawn up in the name of the (Claimant) Defendant, was no proof of his being the actual proprietor of the estate. It is true that the Plaintiff had not been able to prove some things alleged by him, such as the amount of property possessed by the judgment-debtors, &c., in all their entirety, but it was almost impossible for him to do so. On all these grounds, and as the (Claimant) Defendant obviously told a falsehood when he said (in answer to a question by the Court) that he had consulted in *Calcutta*, about the purchase of the estate in dispute, his witness, *Jodoonath Dutt*, a man who had acknowledged that he knew nothing about its value and capabilities whatever, the Court decreed the suit to the Plaintiff, and ordered that the *Mehal* of *Satgachia* be brought to sale in execution, case No. 7, of the Plaintiff's decree, No. 99, in the reversal of the summary decision of the Principal *Sudder Ameen* of the 16th *November*, 1861, without delay. The Plaintiff's costs of both Courts to be borne by the (Claimant) Defendant, and the judgment-debtors, also Defendants, who will also bear their own costs in Court."

From this decree the Appellant appealed to the late *Sudder Dewanny Adawlut*, and on its abolition, the appeal was transferred to the High Court of Judicature at *Fort William* in *Bengal*. That Court, after hearing the arguments, and the evidence taken before the Court below, at its own instance, called for and examined four additional witnesses. The first of these witnesses, *Lollbeharry Dutt*, a silk Merchant, deposed that the Appellant was in his

1866.

SREEMAN-
CHUNDER
DEYv.
GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

1866.

SREEMAN-
CHUNDER
DEY

v.

GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

service as Cashier, receiving Rs. 12 a month wages, besides per-centage allowances, amounting to Rs. 1,500 a year, and that he was a trustworthy man, and of a respectable family. The next witness, *Moheschunder Dey*, already mentioned, confirmed the Appellant's account of the purchase of the *Talook*, and contradicted the witnesses for the first-named Respondent on many points, stating (among other things) that he himself had never been told by the judgment-debtor, *Doorgapersaud*, to buy the *Talook*; that he had desired *Petumber Mookhopadhyaya* to buy it, and had advanced part of the deposit-money, which he had received back; that he had intended to give Rs. 10,000 or 12,000 for the *Talook*, but thought the actual price too high; that the Appellant was in possession, and collected the rents; that *Doorgapersaud* and *Russick-loll* were in a poor condition at the time of the sale, and that the Appellant had sufficient property to make the purchase. *Kartick Seth*, a Broker in jewellery, proved that he had sold for the Appellant certain valuable ornaments which were in pledge at the shop of the Bankers above mentioned. *Gooroodoss Dutt*, the *Ameen*, who had conducted the local investigation in the execution suit, was examined, and verified his seal and signature attached to his report.

Two of the Judges of the High Court, Mr. Justice *Trevor* and Mr. Justice *Jackson*, on the 31st of *December*, 1862, pronounced the decree now appealed from; the material part of which was as follows:—
“After hearing the arguments and the evidence taken before the Court below, we had some doubt of the correctness of that Court's decision, but having called for and examined the additional witnesses, *Moheschunder Dey*, *Lollbeharry Dutt*, *Kartick Seth*, and *Goo-*

roodoss Dutt, we are of opinion, though we do not adopt the reasons of the *Zillah* Judge, that his decision was substantially correct, and that *Sreemanchunder* has really held this property *benamee* for the judgment-debtors. The Plaintiff has called witnesses (*Nook-rorchunder Gossain*, *Ramtaruck Gossain*, and *Brojo-nath Bannerjee*), who gave direct evidence on this point, and whose testimony, if it could be believed, would prove, in every detail, the allegations of the plaintiff. But we find it impossible to believe these witnesses, and the nature of their evidence has afforded a fair subject of attack to the Appellant's Counsel, who remarked, with justice, on the absolute improbability of their statements. This, however, is not the ground on which the present case has to be decided. In a case of this nature, if the Plaintiff succeeds in showing just ground for suspecting the good faith and reality of the title, which is interposed between the creditor and the realization of his dues, the Court will require the ostensible owner to do that which he alone can do, and which he can easily do if he is *bonâ fide* owner, namely, to place beyond a doubt the reality of his ownership. In this case we think there is ample ground for putting the Defendant, *Sreemanchunder*, to such proof. It is clear that, on two former occasions, the judgment-debtors, having closed their trading concerns with heavy outstanding claims against them, had restored to *benamee* arrangements to stay the sale of this estate. It appeared also that *Sreemanchunder Dey*, was a member of the same family, and lived in a part of the same original family premises, though the different branches are now separated, and the Civil Court *Ameen*, who was deputed to make a local inquiry in the execution proceedings, re-

1866.

SREEMAN-
CHUNDER
DEYv.
GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

Advocate High Court
Jammu & Kashmir
Srinagar.

1866.

SREEMAN-
CHUNDER
DEY

v.

GOPAUL-
CHUNDER
CHUCKER-
BUTTY,

ported that the judgment-debtors were in possession. These are circumstances, in our opinion, affecting the Defendant's possession sufficient to make it necessary that he should satisfy the Court that he has the beneficial as well as the proper title to the *Putnee*. This being so, we are bound to say, that so far from being satisfied by the evidence on this point for the Defendant, we see the strongest reason to believe that his purchase was fictitious, and that the name of *Sreemanchunder Dey* has been used merely as a cloak for the real possession and enjoyment of the judgment-debtors. Various witnesses have been called, and especially the Defendant, *Sreemanchunder Dey*, himself, who has been examined at extraordinary, and we think needless, length by the Judge himself, as well as by Counsel on either side. His evidence looks at first sight candid, and in some respects convincing; but it happens that he was before examined in this matter by the Court *Ameen*, his evidence before that Officer being on the record, and that he then betrayed his ignorance of details connected with the property which he affected to enjoy. All defects observable in his evidence then recorded were made good before his second examination in the Judges' Court; but even there he failed to give anything like a satisfactory account of the source from whence he derived the large funds (over Rs. 19,000) required for the purchase of this property. On the contrary, it appeared to us that, although a person of respectability and good repute, and in comfortable circumstances for a person of his class, he was not rich, and by no means likely to have raised at short notice the considerable sum above mentioned. And whatever doubt we might previously have felt with the mode

in which the purchase had been arranged and effected, was wholly dissipated on our examination of *Moheschunder Dey*, the person for whom *Petumber Mookerjee* was said to have been employed to bid, and who was alleged to have made over his bargain to *Sreemanchunder Dey*. Upon the whole, we are fully satisfied that *Sreemanchunder Dey's* purchase was *benamee*, and as it is admitted that the *Talook*, if not *Sreemanchunder Dey's*, was the property of the judgment-debtors, we feel bound to affirm the judgment of the Court below, declaring the *Talook* liable to be sold in execution. The appeal is consequently dismissed, with costs."

The present appeal was from this decree.

Mr. *Baggallay*, Q.C., and Mr. *Macpherson*, for the Appellant.

The finding of the High Court was not warranted by the evidence before them. There is nothing in the deposition of *Moheschunder Dey* tending to support the view taken by that Court, that the *Talook* was purchased *benamee* by or for the judgment-debtors. The report of the Civil Court *Ameen*, that the judgment-debtors were in possession was expressly overruled, and the contrary affirmed by the judgment of the Principal *Sudder Ameen*, which judgment was conclusive as to the fact of the Appellant's possession ; and against that judgment no appeal was interposed, although the *Zillah* Judge thought fit to direct its reversal. We submit, that the decree of the Court below cannot be sustained. The burthen of proving that the judgment-debtors purchased *benamee* and paid for the *Talook*, Lot *Satgachia*, at the auction sale, lay on the first Respondent, and he

1866.
SREEMAN-
CHUNDER
DEY
v.
GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

1866.
 SREEMAN-
 CHUNDER
 DEY
 v.
 GOPAUL-
 CHUNDER
 CHUCKER-
 BUTTY.

failed to prove by evidence that such was the case. [Lord *Westbury*: Did the High Court, under the provisions of the Code of Civil Procedure, Act, No. VIII. of 1859, sec. 355, in the circumstances, properly exercise a discretion, *ex mero motu*, in taking additional evidence, when the burthen of proof was on the Plaintiff, and he, in their opinion, failed to make out his case?] Such a course as the High Court adopted operated most prejudicially on the Appellant, and was contrary to all known principles of jurisprudence, as well as the spirit and intention of that section of the Act. The Plaintiff was bound, in the Court of first instance, to establish the case alleged in his plaint.

Sir *R. Palmer*, Q.C., and Mr. *Paterson*, for the Respondent, *Gopaulchunder Chuckerbutty*.

Although the course pursued by the High Court in calling for further evidence may not be in accordance with the procedure of Courts in *England*, yet, under the Code of Civil Procedure, Act, No. VIII. 1859, sec. 355, the Court had express power to do so. No objection to such course was taken by either side, nor is it noticed in the printed case of the Appellant; and we apprehend it is too late now to insist on such an objection.

Upon the merits we submit, first, that the decision of the *Zillah* Judge, of the 10th of *March*, 1862, was substantially correct, and that he was warranted by the evidence before him in finding that the *Talook*, Lot *Satgachia*, was not actually the property of the Appellant. There is no satisfactory evidence to show how he got the purchase-money; a large sum for a person of his limited means. So, secondly, the decision

of the High Court of Judicature made thereon was correct and just upon the evidence before that Court. Upon a question of fact only, this Court will not disturb such finding. *Mudhoo Soodun Sundial v. Suroop Chunder Sirker Chowdry (a)*.

Their Lordships' judgment was pronounced by
The Right Hon. Lord WESTBURY.

The Appellant in this case became the purchaser of the *Talook* under a decree for sale obtained by judgment-creditors of the owners.

A summary application to set aside the sale having been refused, the Respondent brought the present suit for the purpose of having it declared that the purchase did not affect any transfer of the ownership of the *Talook*.

The Respondent is not himself a judgment-creditor, but he is the Assignee of a judgment-creditor. It appears that the Respondent is a tenant upon the estate, and that, after some dispute had arisen between the tenants and the Appellant, he purchased this outstanding judgment, and, by virtue of that purchase and a transfer of the judgment, has taken the present proceedings. The issue which was raised in the action so brought by the Respondent, and the affirmative of which he has to maintain, is that the *Talook* in question is still the property of the judgment-debtors, and not the property of the Appellant, who was the purchaser. The affirmative lies upon the Respondent; he is to prove his case.

Undoubtedly there are in the evidence, circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by

(a) 4 Moore's Ind. App. Cases, 431.

1866.

SREEMAN-
CHUNDER
DEY

v.
GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

1866.

SREEMAN-
CHUNDER
DEY

v.

GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

the Appellant; but in matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony.

The case relied upon by the Respondent is mainly this,—that the purchase-money, which appears to have been actually paid by the Appellant, was not in reality the money of the Appellant.

In considering a case of alleged fraud in the purchase of an estate, it is material to inquire what relation the purchase-money paid bore to the value of the estate. We have here a statement made by the Respondent himself, that the *Talook* was worth about Rs. 19,200 or Rs. 19,300, and we find that it was sold at the sale, at which the Appellant (being the Assignee of the original bidder) became the purchaser, for Rs. 19,000, which was actually paid.

That circumstance is not conclusive proof of a *bonâ fide* purchase; but it is a strong circumstance, in considering a case which consists of allegations, that there was a collusive agreement between the judgment-debtors, the original owners of the estate, and the Appellant, to buy in the estate for the benefit of the judgment-debtors.

The transaction appears to have been this:—A person of the name of *Petumber* attended the sale as the Agent of another person, who appears to be a man of property, of the name of *Moheschunder*. *Petumber* was declared the highest bidder, and consequently the purchaser. It seems from the evidence that *Petumber* exceeded the authority which had been given to him by *Moheschunder*, his principal. *Moheschunder* had limited the price to be given to a sum of money less than the amount which *Petumber* had

bid; *Moheschunder*, therefore, either repudiated the contract or was desirous of getting rid of it. In that state of things *Petumber* applied to the Appellant to take a transfer of the contract, and the Appellant agreed so to do. The reason for the Appellant purchasing the property does not appear. It does not appear, nor is there any testimony that would warrant at all the inference, that *Moheschunder*, in sending *Petumber* to the auction, was acting as the Agent or on behalf of the judgment-debtors. It is said that *Moheschunder* was a distant relation of the judgment-debtor, but there is nothing like testimony to warrant the conclusion that *Moheschunder* was acting on behalf of the judgment-debtors.

No doubt that would not be material, if it were proved that the Appellant, the Assignee of *Petumber*, was himself the Agent or Trustee of the judgment-debtors. If he was so, of course the estate in the hands of the Appellant might be made available for the satisfaction of judgment-debts existing unsatisfied.

To prove this, the circumstances relied on by the Respondent are, first, the fact, which it is alleged appears on the judicial proceedings under which the sale was made, that two previous sales had been effected of this property, in both of which the real, though not the apparent, purchasers were the judgment-debtors, and that those sales had consequently been set aside. The Courts below and the Respondent here appear to have considered that those facts justified the inference that the judgment-debtors had formed the design in the present case, for the third time, to acquire the property through the instrumentality of a person acting apparently on their own behalf.

1866.

SREEMAN-
CHUNDER
DEY

v.

GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

1866.
 SREEMAN-
 CHUNDER
 DEY
 v.
 GOPAUL-
 CHUNDER
 CHUCKER-
 BUTTY.

Although the fact of these former sales may be referred to, as they appear on the proceedings in the cause in which the sale was made, yet no legal inference affecting the integrity of the present proceeding can with any propriety be drawn from them.

The next circumstance relied upon by the Respondent is this: that the Appellant and the judgment-debtors appear to live still on good terms together; that they are not open and avowed enemies, which it is said would have been the necessary consequence if the Appellant had in reality been the purchaser of the judgment-debtors' estate for his own benefit.

That is a circumstance, again, from which we are of opinion that no legal inference results.

The next thing relied upon by the Respondent, and which is one of the main grounds of his case is this: that the Appellant is unable to give a satisfactory account—nay, may be supposed perhaps to have given a false account in part—as to the manner in which he became possessed of the money in question.

Their Lordships have been much struck with the unsatisfactory character of the account given by the Appellant of the manner in which he alleges he obtained the money, but we cannot help feeling, that it is an inquiry upon which it is not very difficult to suppose that the person who becomes the purchaser of an estate may be unwilling to give a very full statement. But this circumstance, although it may excite doubt, is not a thing from which we can legitimately infer that the Appellant was a bare Trustee of the purchase so made by him.

And, if it inclined us to doubt the Appellant's ownership of the money, there is still a great internal

between that doubt and the conclusion that it was the money of the judgment-debtors, or that the Appellant acted in the matter on his behalf.

It is for the Plaintiff to prove that the money was the money of the judgment-debtors, or that it was supplied or found by some third person for the benefit of the judgment-debtors; but we find nothing which can be accepted either is direct proof of the fact, or as materials from which any such inference can be justly drawn. Two witnesses, called by the Respondent himself, state that, as far as their knowledge extends, the circumstances and the condition of the judgment-debtors were such, that they had not the means of supplying the money in question. The other evidence given by the Respondent is, that a person of the name of *Moheschunder*, some time after the transfer of the contract to the Appellant, raised a sum of Rs. 19,000, and that *Moheschunder* was a friend and second cousin of the judgment-debtors, and, therefore, the Respondent would have us infer that the Rs. 19,000 so raised by *Moheschunder*, being about the amount of the purchase-money for the *Talook*, was raised by him on behalf of the judgment-debtors for the purpose of completing the purchase of the *Talook*, or of repaying the money which it appears the Appellant obtained from certain Bankers at *Calcutta*, in order to complete his purchase.

We are asked, therefore, to hold that the distant connection between *Moheschunder* and the judgment-debtors, and the equality in amount of the sums, are sufficient grounds for the conclusion that the purchase-money was in reality the money of *Moheschunder*, and that he found and advanced it for the benefit of the judgment-debtors. If we were to take away men's

1866.

SREEMAN-
CHUNDER
DEY

v.

GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

1866.

SREEMAN-
CHUNDER
DEY

v.

GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

estates upon inferences derived from such circumstances as these, it would be impossible that any property could be safe.

It is material that this purchase is not really challenged by the judgment-creditors. They have not originated this action, but it is the fruit of the angry feeling of a tenant on the estate, who has sought out a judgment-creditor, and got a transfer of his interest for the purpose of bringing forward this claim; and, therefore, the origin of the action and the circumstances under which it is brought are to be taken into account, when we are considering the truth and reality of the purchase by the Appellant.

It is natural to suppose, that if this purchase, had been generally felt not to be a *bonâ fide* purchase, it would have been questioned by the judgment-creditors themselves, and that they would not probably, for a small consideration, have parted with their judgments to another person, but would have instituted the suit themselves.

In the conduct of the suit, there is a circumstance which their Lordships think it right to advert to.

When the matter came up by appeal to the High Court, the High Court was dissatisfied with the reasons given by the Court below, and with the evidence taken in it; and the High Court, acting apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. It is a power given by the Code to the High Court, which may be very wholesome; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceedings. A power of that character should be

exercised very sparingly; because, where it is done not at the instance of the parties, but at the suggestion of the Court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce; and it is possible (which appears to be the case here) that the new original inquiry by the High Court may be in itself imperfect, and not sufficiently extensive to answer the purposes of justice.

The opinion of their Lordships is, that the evidence which has been given, (there having been the fullest opportunity of giving evidence against the Appellant,) is not sufficient to warrant the conclusion that the Appellant was acting as the Agent of the judgment-debtors.

It is easy to suppose a case in which the Appellant might not in reality be the *bonâ fide* purchaser on his own account, and yet in which there would be no ground for holding that the estate was the property of the judgment-debtor. It is possible to suppose that some of the family of the judgment-debtors might have been willing to find, either wholly or partly, the money for the purchase; but if it were established that the money was not the property of the Appellant, we could not derive from that, the conclusion that the estate was, therefore, the property of the judgment-debtors.

It was said by the Counsel for the first Respondent that no other owner was suggested by the Appellant. There was no obligation upon him to suggest any other owner. He was under no obligation to show whence the money was derived; but, taking everything against the Appellant upon that point, there is still a great chasm between that inference and the

1866.

SREEMAN-
CHUNDER
DEYv.
GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

1866.

SREEMAN-
CHUNDER
DEY

v.

GOPAUL-
CHUNDER
CHUCKER-
BUTTY.

conclusion which alone would support the suit of the Respondent, viz., that the estate is the judgment-debtors' property, both at law and in equity. That is neither established, nor can be legitimately inferred from any of the facts which have been proved.

We are, therefore, of opinion that the decree of the Court below must be reversed; and we shall humbly advise Her Majesty to order that it be reversed accordingly, and that the suit of the Respondent in the Court below be dismissed, with costs. It follows that the Appellant must have the costs of this appeal.

SRIMUT RAJAH MOOTTOO VIJAYA }
RAGANADHA BODHA GOOROO } *Appellant,*
SAWMY PERIYA ODAYA TAVER ... }

AND

KATAMA NATCHIAR, *alias* COOLUN- }
DAPPOORY, Zemindar of Shiva- } *Respondents.**
gunga, and ARMOOGA TAVER ... }

On appeal from the High Court of Judicature at Madras.

6th & 7th Nov.
1866.

Suits were brought in 1832 to recover possession of a *Zemindary*, the principal question being, whether the *Zemindary* was a divided or undivided estate. *A.*, one of the parties, claimed under an alleged testam-

THIS suit was brought to recover possession of the *Zemindary* of *Shivagunga*. The plaintiff sought to establish the genuineness and validity of a Will, alleged to have been executed by *Gowery Vallabha Taver*,

° Present :—Members of the *Judicial Committee* :—the Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor :—The Right Hon. Sir Lawrence Peel.

mentary disposition of the *Zemindar* last seized. The decisions of the

the father of the Respondent, the former *Zemindar* of *Shivagunga*, a Hindoo, who died without leaving male issue, by which it was alleged the *Zemindary* had been devised to *Moottoo Vadooga Taver*, the Appellant's grandfather, the Testator's nearest male relative, to be possessed and enjoyed from generation to generation, subject to a trust thereby declared for the maintenance of the family of the Testator and his servants.

The right to the possession of the *Zemindary* had been the subject of very extensive litigation.

The original suit was brought in 1832, by *Velli Natchiar*, on behalf of her son, *Moottoo Vadooga Taver*, in the Provincial Court for the Southern division of *Madras*, against *Bodha Gooroo Taver*, the son of *Moottoo Vadooga*, deceased, the nephew and alleged devisee of *Gowery Vallabha Taver*, who was in possession of the *Zemindary* as successor to his father, to recover possession of the *Zemindary*, on the ground that her son was the senior grandson of the

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER

v.

KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

Courts in *India* were against the validity of the testamentary disposition. On appeal the Judicial Committee, in 1844, held, that the requirements of *Mad. Reg. XV. of 1816*, in recording the points at issue, had not been complied with, and that the question of division or no division had not been properly tried, and remitted the case to *India*, with liberty to bring a new suit to try that issue. Fresh suits were in consequence brought in *India*, in which the question of the genuineness of the alleged Will was again raised, but the party claiming under the instrument rested his case on the assumption of the *Zemindary* being undivided property. These suits were also appealed to the Judicial Committee in 1863, when their Lordships held that the question of division or no division was immaterial, as the *Zemindary* was self-acquired by the first *Zemindar*. On the hearing of this appeal *A.* abandoned his claim under the alleged Will. The decision of the Judicial Committee being adverse to him, he instituted a fresh suit for the purpose of establishing the Will. The Courts in *India* decided that the judgment of the Judicial Committee in 1863, operated as *res judicata*, and came within the provisions of sec. 2, Act, No. VIII. of 1859, as a suit heard and determined by a Court of competent jurisdiction. Such judgment on appeal affirmed; the Judicial Committee being of opinion, that the validity of the Will being properly at issue in the appeals in 1844 and 1863, and having been abandoned on the latter hearing, the decision was final so far as respected the Will between the parties.

1866.

SRIMUT
 RAJAH
 MOOTTOO
 VIJAYA
 RAGANADHA
 BODHA
 GOOROO
 SAWMY
 PERIYA
 ODAYA
 TAVER
 v.
 KATAMA
 NATCHIAR,
 ZEMINDAR
 OF SHIVA-
 GUNGA.

first wife of *Gowery Vallabha Taver*, and as such was entitled to succeed in preference to nephews and widows, and alleging that *Gowery Vallabha Taver* and his brother, *Oodya Taver*, were divided in estate, and that the alleged Will of *Gowery Vallabha Taver* was a fabrication.

Bodha Gooroo Taver by his answer contended, among other things, that the Will was valid, and that in the case of partible estates, nephews were preferred to daughters, daughters' sons, and widows.

The points recorded in this suit were, that the Plaintiff should prove the alleged combination respecting the fabrication of the Will, by means of which the Defendant's father got possession of the *Zemindary*, and the Defendant produce the Will and prove its execution. Evidence having been given on these points, the Provincial Court passed a decree in favour of *Bodha Gooroo Taver*, on the ground that the self-acquisition of an undivided brother descended to his nephew in preference to his widow and daughters' sons: and as regarded the Will, the Court expressed an opinion that the evidence respecting it was not to be relied upon.

In the year 1833, another suit was brought by *Anga Moottoo Natchiar*, the surviving widow of *Gowery Vallabha Taver*, against *Bodha Gooroo Taver*, claiming the *Zemindary* as heir of her husband, and charging that the Defendant had forged the alleged Will. The Defendant denied the charge of forgery, and relied upon his title under the Will; and the Provincial Court held that the *Zemindary* was the self-acquired estate of *Gowery Vallabha Taver*, and (assuming that the brothers were undivided) decided that the self-acquired estate of an undivided brother, dying without male

issue, descended to his nephew in preference to his widow. In this view of the Court the issue on the Will, though properly raised, became immaterial.

The several Plaintiffs in these two suits appealed to the *Sudder Dewanny Adawlut* at *Madras*, and among their grounds of appeal was the genuineness of the Will, relied upon by *Bodha Gooroo Taver*, which was impeached by the other party.

In the year 1837, the *Sudder* Court made one decree in the two appeals, in which it determined that *Gowery Vallabha Taver* and his brother were divided, and that the self-acquired property of a divided brother descended to his widow in preference to his brother's son, and that the Will in question was not a valid, but was a fabricated instrument.

Bodha Gooroo Taver appealed to Her Majesty in Council from the above decree. He died pending the appeal, which was revived by *Gowery Taver*, his brother. In his case the Appellant relied, among other reasons, as his title to the *Zemindary*, upon the Will of *Gowery Vallabha Taver*.

By the judgment of the Judicial Committee and Order in Council made thereon in *June*, 1844, the decree of the *Sudder* Court made in 1837 was reversed, on the ground that no points had been recorded, as required by *Mad. Reg. XV. of 1816, sec. 10 (a)* by the Court below on the question of division or no division; leave was, however, given to *Anga Moottoo* to bring a new suit within three years, the Judicial Committee intimating their opinion that the question of division was the most substantial question, and appeared to be the only point on which the main question of title would ultimately depend.

In pursuance of the leave thus given, *Anga*

(a) See case reported, 3, Moore's Ind. App. Cases, 278.

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

Moottoo, in 1845, brought a suit *in formâ pauperis*, against *Gowery Taver*, who had been put into possession of the *Zemindary*, and his younger brother, *Namasiraya Taver*, to recover possession of the *Zemindary*, claiming to be heir of her deceased husband, shaping her case in a twofold manner; first, on the assumption that her husband and his brother were divided; but secondly, contending that the question of division or no division was immaterial, on the ground that the *Zemindary* was the self-acquired estate of her husband, and so descended to her as his heir, whether he was a divided or undivided brother. *Gowery Taver* by his answer relied upon the Will; but contended that the Plaintiff ought to have confined herself to the question of division or no division, and denied the title set up by her as to the descent of self-acquisitions of an undivided brother.

On the 27th of *December*, 1847, the Civil Court made a decree by which it was declared, first, that the family was undivided; secondly, that the alleged forgery of the Will by *Moottoo Vadooga Taver*, ought not to be urged against him as betraying any consciousness of a want of title; and thirdly, as to the Will itself, the Court stated that it was a mere nullity, which the Court need not look at or regard, and, moreover, that it was not a devise, but was a mere declaration of right.

Anga Moottoo appealed to the *Sudder Court* at *Madras*. Pending the appeal *Gowery Taver* died, leaving the present Appellant, a minor, his heir. The appeal was heard by the *Sudder Court*, and judgment reserved, but before its delivery, *Anga Moottoo* herself died, childless, in consequence whereof the appeal abated. Several Claimants to the *Zemin-*

dary presented themselves as heirs in remainder, claiming to carry on the appeal, but they were referred to the Civil Court to institute suits to establish their respective claims.

Accordingly, on the 5th of *December*, 1856, the present Respondent brought a suit *in formâ pauperis*, in the Civil Court of *Madura*, for the recovery of the *Zemindary*, against the gaurdian of the present Appellant, and the Collector, as Agent of the Court of Wards, and in it she urged the forgery of the Will. The Appellant, by his guardian, filed his answer, but did not set up any claim under the Will.

Sowmea Natchiar, one of the daughters of *Vallabha Taver*, also brought a suit in the year 1857, claiming, as heiress in remainder, to the same effect as the Respondent's suit.

By a decree of the Civil Court, made in the two suits, dated the 25th of *August*, 1859, both suits were dismissed, the Court being of opinion that the decree of the 27th of *December*, 1847, was a judgment *in rem* on the fact of division. The *Sudder* Court confirmed this judgment on appeal on the 5th of *November*, 1859, on the ground that the question of division had been finally set at rest by the decree in 1847.

The Respondent appealed to the Privy Council from these decisions, relying on the division between the Respondent's father and his brother, and contending that the self-acquisition of an undivided brother descended to his widows and daughters in preference to brothers and their sons, and insisting that the Will relied on was a forgery. The Appellant in his case did not rely upon the Will, but supported the decrees on the ground, first, that the *Zemindary* was not the self-acquired property of *Gowery Vallabha*

1866.
SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

Taver, but was ancestral property; secondly, that *Vallabha* and his brother were undivided; and, thirdly, that the heir of an undivided brother was his brother and not his widow and daughters. In the argument before the Privy Council, the Appellant urged upon the Court the forgery of the alleged Will, and the Counsel for the Respondent did not rely upon, but virtually abandoned it (a).

By the judgment of the Judicial Committee, dated the 30th of *November*, 1863, it was decided that the Respondent and her sisters were entitled to recover the *Zemindary*, irrespective of the question of division, on the ground that the self-acquisition of an undivided brother passed to his widow and daughters in preference to his brothers and their issue; and with respect to the Will, the judgment contained this passage: The Respondent "seems to have set up an instrument, which in the proceedings is called a Will. On the Appellant's side this is treated as a forgery. The Respondent, denying the forgery, does not now treat the document as a testamentary disposition, or as material to his title, and it may, therefore, be dismissed from consideration" (b).

Consequent upon the Order in Council made on the above judgment, the Respondent was put in possession of the *Zemindary*.

On the 25th of *April*, 1864, the Appellant brought a suit in the Civil Court of *Madura*, against the Respondent and *Anga Taver*, the husband and representative of the Respondent's deceased sister, *Bootaka Natchiar*, to recover the *Zemindary*. The plaintiff, after stating the before-mentioned facts, and that, in the suits brought in 1832 and 1833, the Appellant's ancestor had pleaded the Will; alleged that in

(a) 9 Moore's Ind. App. Cases, 582.

(b) *Ib.* p. 590.

neither of those suits was any decision given upon it; though in the *Sudder* Court's decree of 1837, that Court incidentally stated its opinion that the Will was a fabrication, but this opinion, so far as related to the Will, was extra-judicial and unnecessary to the decision of the case; that in the suit in 1845, the Appellant's father had relied on the Will, but was not allowed to prove it, or produce documents in support of it, and the Respondent, in the suit of 1856, had also relied on the Will; that no decision was given on the merits; and that on the appeal before the Privy Council the Will was not and could not be adjudicated upon, as it formed no part of the record, and he founded his claim under the Will, and a *Razinamah* or agreement in *July*, 1830, alleged to have been entered into by the three widows of *Gowery Vallabha Taver*, as giving him a good title, notwithstanding the last-mentioned judgment of the Judicial Committee of the Privy Council.

On the 4th of *May*, 1864, Mr. *C. R. Pelly*, the Acting Civil Judge, made an Order, under sec. 2 of Act, No. VIII. of 1859, as follows:—The question of the title to the property referred to in the plaint, as between the Plaintiff and Defendants, having been disposed of by the judgment of the Lords of the Judicial Committee of the Privy Council, delivered on the 30th of *November*, 1863, it cannot now be revived on the ground set forth in the plaint. The plaint is accordingly rejected.

The Appellant appealed to the *Sudder* Court, on the ground that the Order of the Acting Civil Judge of *Madura* was wrong in law, as the Plaintiff's case, as made out in his suit, had not been before adjudicated upon by the Judicial Committee of the Privy Council.

The appeal was heard before the High Court of

1866.
 SRIMUT
 RAJAH
 MOOTTOO
 VIJAYA
 RAGANADHA
 BODHA
 GOOROO
 SAWMY
 PERIYA
 ODAYA
 TAVER
 v.
 KATAMA
 NATCHIAR,
 ZEMINDAR
 OF SHIVA-
 GUNGA.

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

Judicature at *Madras*, and the following judgments were delivered on the 11th of *July*, 1864. The Chief Justice *Scotland*:—The parties to this suit and to the suits in which judgment upon appeal was recently given by the Judicial Committee of Her Majesty's Privy Council are the same. The question to be considered is, whether the cause of action upon which the present suit is brought was finally concluded by the judgment and decree in the appeal; for, if so, the Civil Judge was right in refusing to take cognizance of the suit; and, I am of opinion, that the present cause of action was concluded. It can make no difference in the consideration of the question that the party, now Plaintiff, was Defendant in the former suit; what we have to be satisfied of is, that the ground of legal right upon which the Plaintiff sues was a point raised and open for decision in the former suit, and that it was finally dealt with by the judgment and decree. Now, the cause of action in this suit is, the right of the Plaintiff to recover possession of the *Zemindary* as the legal representative of *Moottoo Vadooga Taver*, the devisee under the alleged Will of *Gowery Vallabha Taver*, the former *Zemindar*, in whom, under the *Sunnud i Milkeat istimrar*, the *Zemindary* vested as his self-acquisition. The whole foundation of the suit clearly is the validity of the alleged devise to *Moottoo Vadooga Taver*; for as a ground of action, no effect, it seems to me, can now be given to the statements in the plaint as to the agreement of the 29th of *July*, 1830. Then what was the nature of the case made by the parties in the former suits, and what were the questions raised in those suits and involved in the final decision of Her Majesty in Council in the appeal? The appeal appears to have been against the decrees and orders in the suit

brought in 1845 by *Anga Moottoo*, one of the widows of the *Zemindar*, *Gowery Vallabha Taver*, and in the suit brought in 1856 by the present Defendant, his second daughter, and we must look, I think, to the plaint and proceedings forming the record in both those suits. In the first, the widow in her plaint rested her claim to recover the *Zemindary* from the principal Defendant, the father of the present Plaintiff, upon the grounds, first, that a division had taken place between her husband and the Defendant's father, *Odaya Taver*; and secondly, that the *Zemindary* had become the separate self-acquisition of her husband, under the grant made to him by the Government. In answer, the Defendant pleaded a denial of the alleged division, and distinctly set up and relied upon his preferable right to the *Zemindary*, as the next heir male, in the undivided family; and also under the terms of the Will of the Plaintiff's husband, giving the *Zemindary* to the Defendant's father in default of male issue. The reply and rejoinder it is unnecessary to refer to, further than to remark that, although, as pointed out by the Appellant's Counsel, it was urged in one passage of the reply that the suit should be heard and decided upon the point of division only, yet the Defendant in the rejoinder repeated and insisted upon the grounds of title set forth in the answer. In the second suit of 1856 against the guardian of the present Plaintiff, who had succeeded on the death of his father, the Plaintiff claiming in succession to *Anga Moottoo* rested her title upon the same grounds. The answer of the guardian impeached the Plaintiff's right as heir, and referring to many of the facts set forth in the suit of 1845, stated a number of circumstances as showing that the infant Plaintiff was the rightful


1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER

v.

KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

1866.


 SRIMUT
 RAJAH
 MOOTTOO
 VIJAYA
 RAGANADHA
 BODHA
 GOOROO
 SAWMY
 PERIYA
 ODAYA
 TAVER
 v.
 KATAMA
 NATCHIAR,
 ZEMINDAR
 OF SHIVA-
 GUNGA.

heir. It does not appear to have contained express mention of the alleged Will; but in the rejoinder, the *arzi* to the Collector is referred to, and it is stated that under the *arzi* and the Will the *Zemindary* had been held by those through whom the infant claimed. Upon these pleadings it sufficiently appears, I think, that the claim of title under the gift by Will to *Moottoo Vadooga Taver* was raised and made in defence as much a distinct question for decision as it is conceded it had been in the earlier suits. It is true that the parties were restricted in the first suit to evidence upon the point of division, and that in the second suit no points or issues were settled. But the course of proceeding in both cases appears to have resulted from the Civil Judge's opinion, that division or non-division was the only ground upon which the widow's right could be questioned. The parties were not thereby precluded from afterwards relying upon the other questions raised by the pleadings. It was quite open to the present Plaintiff, as Respondent in the appeals in both suits, to put forward the right claimed under the Will, and to have his case upon that point fully heard and determined, just in the same way as it was open to the Appellant to rely (as she did successfully) upon her right to the *Zemindary*, as her husband's self-acquired property, though there had been no division. Further, as the case for the Appellant was presented before the Privy Council, it became obviously most material for the Respondent, alleging the genuineness of the Will, to rely, if he could, upon its validity to pass the *Zemindary*, being the Testator's separately acquired property, from the female heirs, and if this had been done, their Lordships who heard the appeal would necessarily have given judgment expressly upon the question before

deciding in favour of the Appellant's right as heir. Looking, then, to the proceedings in the two former suits, it appears to me that the claim which is now made a cause of action, was a question fully open to the Plaintiff upon the appeal in those suits, and that it rested upon precisely the same circumstances as those upon which the Plaintiff seeks to support the present suit ; that his case as regards the Will is in truth one and the same in this and the former suits. But it was urged that, as there was no direct decision expressed by the Privy Council upon the Will, the Plaintiff was not concluded. What we find is, that on the part of the Plaintiff the alleged Will was not relied upon. Not, however, it appears, because the question of right under it was not open, but because, as a Will, it was considered and admitted to be quite untenable. Their Lordships observe, in their judgment, that "the Respondent, denying the forgery, does not now treat the document as a testamentary disposition or as material to his title, and it may, therefore, be dismissed from consideration ;" and so disposing of all questions of disposition by Will, their Lordships decide against the Plaintiff's right to the property then in litigation, and which is now sought to be made the subject of another suit. Under these circumstances, I think the judgment and final order in the appeal involved the decision of all claim of title under the Will, and must now be considered between the parties as tantamount to an express adjudication upon such claim. As a rule, a party, I think, is bound to bring forward his whole case in respect of the matter in litigation and open to him upon the points for decision in the suit. He is not at liberty to abstain from relying upon, still less to abandon (as in this case) a ground of claim which is

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER

v.

KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

in question and proper for consideration and decision in the suit, and afterwards to make it a cause of fresh suit in respect of the same subject-matter of litigation. This rule was acted upon in the case of *Henderson v. Henderson* (3 Hare, 115). Several other cases were cited from the English Reports, as to which I need only observe that some of the cases turn upon questions of English pleading, and none of them, I think, can be usefully applied as authorities to the circumstances here, except so far as they point out the principle and grounds upon which the defence of *res judicata* rests. The grounds are very clearly stated in the recent case of *Hunter v. Stewart* (31 Law Journ. Ch. 346), and applying the conditions which the Lord Chancellor *Westbury* there refers to from the commentary of *Vinnius* as necessary to the validity of such a defence, I think there is in this case '*idem corpus, eadem quantitas, idem jus, eadem causa petendi, eademque conditio personarum.*' For these reasons I am of opinion, that the final decision upon appeal in the two former suits must be considered as an adjudication in respect of the claim under the alleged Will as well as the other questions raised, and that the Plaintiff is concluded from bringing the present suit, and consequently, that the plaint was properly rejected under section 2 of the Civil Procedure Code, Act, No. VIII. of 1859. The appeal, therefore, must be dismissed, and with costs. In the course of the argument, I alluded to another objection as arising upon the face of the plaint, namely, that its subject-matter did not constitute a cause of action, this Court having in two recent cases (See 1 *Stoke's Mad. High Court Reps.* pp. 141, 349), decided that a *Zemindar* holding under a permanent Settlement could not make any alienation of his *Zemindary* binding upon his

legal successors, otherwise than as provided by Regulation XV. of 1802. It has become unnecessary to consider this objection, but I ought to observe that it is one which, under section 32 of the Civil Procedure Code, the Court, I think, would have been bound to decide before the case could properly have been remanded for trial in the Civil Court, and if the decisions just referred to be correct, it seems difficult to see how the statements in the plaint could be held to constitute a cause of action.

Mr. Justice *Holloway* delivered his judgment in these terms:—It is unnecessary to repeat the nature of the pleadings, but I will first consider the decree and then the record upon which it was made. Secondly, the judgment of the Lords of the Privy Council is, that the Plaintiff is entitled as against the present Appellant, then the Defendant in possession, to recover the *Shivagunga Zemindary*. There is no question here as to the technicalities flowing from the nature of the English action of ejectment. The decree could be arrived at only by affirming all matters necessary to the proof of Plaintiff's title, and by negating all matters, perhaps, whether pleaded or not, which would enable the Defendant to resist such a decree. It is unnecessary, however, in justification of my judgment, to push the proposition so far, for it is quite clear that the Will was pleaded by the Defendant at every stage in the Court below. Then it is sought to avoid the effect of the decree by showing that the Court, following the former judgment of the Privy Council, wholly excluded the question of this Will. This is so, and if the Defendant's case was substantially prejudiced by this proceeding, it would have been a good ground for an application to the Superior Court for further inquiry. That Counsel in not pressing the point

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER

v.

KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVAR
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

were mistaken, is answered by the passage of *Nerutius*, quoted by me during the Advocate-General's argument:—'*Cum de hoc an eadem res est quæritur, hæc spectanda sunt, personæ id ipsum de quo agitur causa proxima actionis; nec jam interest qua ratione quis eam causam actionis competere sibi existimasset; perinde ac si quis, postea quam contra eum judicatum esset, nova instrumenta causæ suæ reperisset.*' That the law as to a cause of action applies with at least equal force to a possible exception, whether taken or not, there exists no doubt. As to the law of the subject, and the rule derivable from the numerous cases cited, there is, I believe, no difference of opinion between the Bar and the Court. *Hunter v. Stewart* followed naturally from the nature of equitable pleadings. A Plaintiff cannot say generally, I am entitled to such relief, but he must allege the particular grounds upon which he seeks it, and he must further state everything which he intends to prove. The matter in that case was not *res judicata*, because 'the allegations and equity of the one Bill are different from the allegations and equity of the other.' This decision is, however, supposed to have overruled that of the Vice-Chancellor *Wigram*, in *Henderson v. Henderson*; but, if the actual decision in that case had been in conflict with that of the Lord Chancellor in *Hunter v. Stewart*, his Lordship would scarcely have said, "but I find no authority for this position in civil suits, and no case was cited at the Bar, nor have I been able to find any, in which a decree of dismissal of a former Bill has been treated as a bar to a new suit asking the same relief, but stating a different case, giving rise to different equity" (a). Undoubtedly there are, in *Henderson v. Henderson* (3 Hare, p. 115), some general dicta,

(a) 31 L. J. Ch. 350.

which, unless read, as we are bound to read them with reference to the facts of that case, would conflict with the decision in *Hunter v. Stewart*. The decision itself, however, discloses no conflict whatever. The Plaintiff in equity sought relief on account of various irregularities, alleged by him to have been committed by the Court in *Newfoundland*, from which an appeal lay to the Privy Council, which Tribunal had power to stay execution pending the appeal, and to remedy in appeal the irregularities, if any such had been committed. It was quite clear, therefore, that the Plaintiff had made no case for an injunction against an action upon the Colonial Court's judgment. Thirdly, *Seddon v. Tutop* (6 Term Rep. 607), is a case upon which we did not remark in our oral judgments. It was an action for goods sold, and the plea was a former recovery in an action of the sum of £71 10s. "for the damages the Plaintiffs had sustained as well by means of not performing the same identical promises," as for their costs. The facts were, that the Plaintiffs had given no evidence on the writ of inquiry as to the goods sold. The replication denied that the promises declared upon were the identical promises, for the non-performance of which the said sum was recovered. Lord *Kenyon* says:—"The issue was, whether the damages demanded in this action have been already satisfied by the recovery in the former action; and most clearly they have not." On this narrow question, the only one raised by the pleadings, both formally and substantially, justice was with the Plaintiff, and the case is no authority whatever for the position that a new suit can be brought for a portion of the same demand, because that portion has not for some reason been the subject of inquiry.

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA,

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVAR
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

Fourth; a comparison of the plea in that case with that in *Lord Bagot v. Williams* (3 Barn. & Cress. 235), will show that this is so. It is not for us sitting in this Court to comment upon the question whether the course taken by the Lords of the Judicial Committee of the Privy Council was justifiable or not. It is sufficient to say, that there is a decree of a Superior Court distinctly declaring that the Plaintiff is as against the present Appellant entitled. I entertain no doubt whatever, that the effect of this decree is to bar the cause of action at present set up, because it is *res judicata*, the matter of it being an exception to the Plaintiff's cause of action which that decree must have overruled. Fifth; there is no question here of Bills of review, if our procedure admitted of them, or if an inferior Court could entertain such a Bill if it were admissible. The case is simply one of a new suit brought by a defeated Defendant upon a plea which he had already pleaded in the suit in which judgment was given against him. Sixth. It is not necessary to consider now the different positions of a Plaintiff whose Bill has been dismissed, and of a Defendant whose plea must have been overruled, to justify the decree passed. The case seems to me a very plain one, and this appeal must be dismissed with costs.

The present appeal was against the decree of the High Court of the 11th of *July*, 1864, as well as the decree of the Civil Court of *Madura*, dated the 4th of *May*, 1864.

The Attorney-General (Sir *John Rolt*, Q.C.) and Mr. *Leith*, for the Appellant.

Both the decrees appealed from were wrong in holding, that under sec. 2 of the Act, No. VIII. of 1859,

the judgments of this Tribunal in 1844 and 1863 and the Orders in Council made thereon (a) was a bar to the suit now under appeal. The present suit was brought to establish the due execution and validity of the Will of the original *Zemindar, Gowery Vallabha Taver*. Such cause of action had not been "heard and determined by a Court of competent jurisdiction in any former suit between the same parties, or between parties under whom they claim." This is the language of that section of the Act, which the Court below has held thus defines this suit *res judicata*. By the decision of this Court in 1844, the Will, though referred to, was not adjudicated upon, nor was it in issue. Neither in the appeal in 1863 from the *Sudder* Court's decree in *India* consequent on that judgment was the question of the due execution and validity of such Will raised. The suit out of which the appeal in 1844 arose, did not raise in their Lordships' opinion, the proper issue; but that was no fault of the parties, but of the Court below neglecting the observance of the law of procedure then in force, *Mad. Reg. XV. of 1816*. It was the duty of the Court to record the points under the 10th section of that Regulation. In the suit thereafter to be brought the parties were restricted by the judgment of the Privy Council to the single question of division or no division of the *Zemindary*. In neither of the appeals brought here (b) was the validity of the Will at issue; and,

1866.
 SRIMUT
 RAJAH
 MOOTTOO
 VIJAYA
 RAGANADHA
 BODHA
 GOOROO
 SAWMY
 PERIYA
 ODAYA
 TAVER
 v.
 KATAMA
 NATCHIAR,
 ZEMINDAR
 OF SHIVA-
 GUNGA.

(a) 3 Moore's Ind. App. Cases, 278.

(b) On the argument before the Civil and *Sudder* Courts, the Records in the Privy Council appeals of 1844 and 1863, respecting the right to the same *Zemindary*, were referred to by the Counsel. The Respondent, on special application to the Privy Council, obtained leave to refer to them on the argument of this appeal.

1866.
 SRIMUT
 RAJAH
 MOOTTOO
 VIJAYA
 RAGANADHA
 BODHA
 GOOROO
 SAWMY
 PERIYA
 ODAYA
 TAVER
 v.
 KATAMA
 NATCHIAR,
 ZEMINDAR
 OF SHIVA-
 GUNGA.

therefore, no adjudication on the points, this Tribunal decided, could have been made, or was in fact made, as the issue was confined to that single point. The Will was never abandoned, either by the Appellant, then a minor, or by his father in his lifetime; therefore, the decree of 1863 was not *res judicata*, so as to be pleaded as a bar to the present suit: *Henderson v. Henderson* (a); *Bainbrigge v. Baddeley* (b); *Toulmin v. Copland* (c); 3 *Burge's Comms.* on Col. & For. Laws, p. 1014, who refers, as the primary authority, to the *Dig. lib. 42, tit. i. l. i.*; and *lib. 44, tit. 2.* As the relief sought by this suit is founded upon a case never before put in issue or adjudicated upon, there is no bar to the cause of action. One of the criteria of the identity of two suits, in considering the plea of *res judicata*, is the inquiry whether the same evidence would support both, *Hunter v. Stewart* (d). The title of the Appellant's late granduncle is under a testamentary instrument valid by Hindoo law, in force in *Madras*, and overrides the title by inheritance of the Respondent, *Nagalutchmee Ummal v. Gopoo Nadaraja Chetty* (e). That case shows that the Court below was in error in extrajudicially holding that a *Zemindar* under the permanent Settlement could not alienate his *Zemindary*. The cases referred to in the High Court do not support that position. *Subbarayulu v. Ná Yak Ráma Reddi* (f) only decided upon the point of restraint on alienation as against the Government. *Malavaraya Nayanar v. Oppayi Ammá* (g) related to the right of maintenance of a

(a) 3 Hare, 115.

(b) 2 Phill. 705.

(c) 2 Phill. 711.

(d) 31 L. J. Ch. 350.

(e) 6 Moore's Ind. App. Cases, 309.

(f) 1 Stoke's Mad. H. C. Reps., 141.

(g) *Ib.* 349.

sister out of the *Zemindary*. Moreover, the Appellant, as heir in succession, is entitled to repossession of the *Zemindary*, subject to the trusts of the Will.

Sir *R. Palmer*, Q. C., and Mr. *W. W. Mackeson*, appeared for the Respondent, but were not called upon.

The Right Hon. Lord WESTBURY :

The facts of this case have been lucidly presented to us, and the case has been argued very ably by the learned Counsel for the Appellant; but their Lordships feel no difficulty upon the point. All that has been urged is involved in and decided by the judgment of the Privy Council in the year 1863, and what passed before this Tribunal on that occasion.

To render our decision intelligible, it is necessary to make a short recapitulation of the leading facts of the case.

On the death of the *Zemindar*, the original proprietor, questions arose whether he was undivided in estate with his brother, and whether this property was to pass as undivided or divided estate. A document was produced in which the *Zemindar* made a testamentary gift of the estate to the Appellant's father, in the event of the child of one of his widows, who was *enciente*, not proving to be a son. A great deal of litigation ensued; but in the suits that were brought before the Privy Council in 1844, the exact issue, whether the family was undivided or divided, had not been so raised as to become necessarily the subject of judicial determination. The issue, however, of the validity of the alleged testamentary paper had been raised, and the decision of the *Sudder* Court was against it.

When the case came before the Privy Council in

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER
v.
KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

1844, having regard to the law touching undivided property, their Lordships were of opinion that there must be a judicial determination upon the point, whether the family was divided or undivided before the question of the validity of any devise could arise. No opinion, therefore, was expressed upon the issue raised as to the validity of the testamentary paper, which remained until it had been ascertained that the property in question was capable of being devised. The Privy Council accordingly remitted the case, pointing the parties' attention to the necessity of having it determined, whether there was division or no division. It is plain that when the issue was raised, whether there was division or no division, the importance of determining whether the paper in question was a valid testamentary gift or not would immediately be felt; because, if it should turn out that it was a divided property, then the party in possession, claiming by virtue of his being a nephew of the deceased proprietor, would immediately have been enabled to set up the Will as constituting his title. But it has been contended before us to-day, that what was said by the Privy Council must be considered as amounting to a positive direction that there should not, in the subsequent litigation contemplated, be any question whatever raised except the question of division or no division. It is plain to us that the language used by the Privy Council on that occasion does not admit of any such construction. The same point was raised and insisted upon before the Judicial Committee in 1863; for it was then contended, on behalf of the present Appellant, or those who preceded him in title, that the suits which had been instituted and were brought by way of appeal were suits that transgressed the limits imposed by the Order in Council

of 1844 (being, in effect, the same argument that we have heard to-day); but that contention was overruled, and it was held that the Order in Council of 1844 did not at all interfere with or preclude the parties from bringing forward the claim, and instituting the suits which they had instituted subsequently to 1844, the decrees in which were the subject of the appeal to the Queen in Council in 1863.

We take as an example of these suits the form of the suit, No. 10, of 1856. One of the present Respondents filed her plaint in that suit for the recovery of the *Zemindary*, and the question of the forgery or genuineness of this alleged testamentary paper was distinctly raised in that plaint. By the answer to it, the present Appellant, answering by his guardian, did not set up the alleged testamentary paper, but he rested his defence on the ground that as to this property the brothers were undivided. Ultimately, all the suits came before the Judicial Committee of the Privy Council in 1863; and the Judicial Committee were of opinion that the question of division or no division was, after all, immaterial, because they found it clear that the *Zemindary* in question was self-acquired property; that is, that the deceased proprietor had been the first to acquire it; and they accordingly held, that even if the brothers were undivided, yet that the estate being self-acquired, was not governed by the law applicable to undivided property, but descended to the heirs general, and was capable, therefore, of being devised. Immediately it became most material, in the mind of the Judicial Committee of 1863, to determine the question with regard to the testamentary paper; but they were wholly relieved from the necessity of doing so, because the present Appellant, then appearing by most


1866.

SRIMUT
RAJAH
MOOTTOO
VIJAYA
RAGANADHA
BODHA
GOOROO
SAWMY
PERIYA
ODAYA
TAVER

v.

KATAMA
NATCHIAR,
ZEMINDAR
OF SHIVA-
GUNGA.

1866.


 SRIMUT
 RAJAH
 MOOTTOO
 VIJAYA
 RAGANADHA
 BODHA
 GOOROO
 SAWMY
 PERIYA
 ODAYA
 TAVER
 v.
 KATAMA
 NATCHIAR,
 ZEMINDAR
 OF SHIVA-
 GUNGA.

able Counsel, as the Respondent at the Bar, deliberately told their Lordships, that although the paper in question had been familiarly called a Will, the name had been introduced only as a short denomination of the instrument, which in reality was not testamentary, and neither had, nor was ever intended to have, the effect of devising the property; and that the Respondent did not claim any title under it as a testamentary devise; but used it only as conclusive evidence of what the opinion of the last proprietor was, viz., that this *Zemindary* was in reality undivided property. It is quite plain why the learned Counsel for the then Respondent adopted that course. In their minds it was thought safest to rest their case upon the question of division or non-division. They appear to have reasoned thus:—"If we set up this as a Will, then it is a conclusive declaration by the alleged Testator that the property was devisable; and if devisable, that it was not undivided. We will, therefore, abstain from treating that instrument as an instrument of title. We will abstain from insisting upon it as a devise, and we deliberately tell the Judicial Committee, that it is not to be regarded as being in any sense testamentary." The result, therefore, was, that the Judicial Committee, carefully acting, as it did throughout, in the hope and with the express object of preventing further litigation, recorded in its judgment the fact that the Respondent's Counsel, had deliberately elected to disclaim any title under that instrument as a Will, and that, therefore, its validity or invalidity became no longer material for decision.

That being the state of the case, we are now called upon to approve of a suit, subsequently instituted by the very person who had deliberately given this

character to the instrument, a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid Will and testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the Appellant had then the power of relying upon that document as being a valid Will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might, first, have insisted that it was an undivided property, and that, therefore, the Plaintiff in those suits had no interest therein; and, secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour. When a Plaintiff claims an estate, and the Defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present Appellant might have insisted on the validity of the alleged Will; but instead of doing so when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a Will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the Appellant of setting up the Will, were allowed.

On every ground, therefore,—first, on the general ground that the thing was in issue, and that what was in issue must be taken to have been decided by the judgment; secondly, upon the personal ground that the Appellant having used this document and

1866.
 SRIMUT
 RAJAH
 MOOTTOO
 VIJAYA
 RAGANADHA
 BODHA
 GOOROO
 SAWMY
 PERIYA
 ODAYA
 TAVER
 v.
 KATAMA
 NATCHIAR,
 ZEMINDAR
 OF SHIVA-
 GUNGA.

1866.
 SRIMUT
 RAJAH
 MOOTTOO
 VIJAYA
 RAGANADHA
 BODHA
 GOOROO
 SAWMY
 PERIYA
 ODAYA
 TAVER
 v.
 KATAMA
 NATCHIAR,
 ZEMINDAR
 OF SHIVA-
 GUNGA.

abandoned all right to it as a Will, cannot now use it for a different purpose; we are of opinion, that there is no doubt as to the correctness of the determination of the Court below. We regard this suit, in which the present appeal is brought, as a suit instituted without *bonâ fides*, and directly contrary to what the Appellant must be considered to be bound by; and we have no hesitation, therefore, in advising Her Majesty to affirm the decree, and to direct that this appeal be dismissed, with costs.

Sir *R. Palmer*.—It may be a satisfaction to your Lordships to know that what Sir *Hugh Cairns* did at the Bar was a mere repetition of what had been done in the printed answer to the appeal by the Respondent in *India*, and your Lordships will find it at p. 218, par. 39 of the Record of the appeal in 1863, which runs thus:—"In opposition to par. 64 of appeal petition, Respondent submits that the correspondence which passed at the time shows that the Government authorities did acknowledge the *prima facie* right of the Respondent's grandfather, and that the Civil Court was correct in terming the Will a mere declaration of right. It is only necessary to refer to Reg. V. of 1829 to perceive that it could not possibly be more, and that in quoting it the Government Officers could only have viewed it in that light, and not as a bequest."

Lord *Westbury*.—I am very glad that you have stated that, because it removes from the case any possibility of its being supposed that Sir *Hugh Cairns* either mistook or exceeded his instructions.

Sir *R. Palmer*.—That was my motive for mentioning it.

APPOVIER *alias* SEETARAMIER ... *Appellant*;

AND

RAMA SUBBA AIYAN, VENKATARANA
AIYAN, ANANTAMMAL, ANNA AIYAN,
and ANANTANA RAIYANA AIYAN... } *Respondents.**

*On appeal from the Sudder Dewanny Adawlut
at Madras.*

IN this case the suit was brought by the Appellant in the Court of the Principal *Sudder Ameen* at *Tinnevely*. The object of the suit was to establish his claim, as a member of an undivided Hindoo family, to a moiety by right of inheritance of the family

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor :—The Right Hon. Sir Lawrence Peel.

16th, 17th
Nov.,
1866.

According
to the true
constitution of
an undivided
Hindoo
family, no
individual
member of
the family,
whilst it re-
mains undi-
vided, can

predicate of the joint and undivided property, that he has a certain definite share.

The proceeds of undivided property must be brought to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of the family. But if the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and each member has thenceforth a definite and certain share in the estate, which he may claim to receive and enjoy in severalty, although the property itself has not been actually severed and divided.

Where, therefore, a deed of partition was made and executed by the members of an undivided family, dealing with and making actual partition of a portion of the joint estate, but leaving the remainder to be divided at a future period in the same manner; Held, by the Judicial Committee (affirming the judgment of the Courts below), that such deed, being a division of right, operated as a conversion of the tenancy and a change of *status* in the family, *quoad* the property specified, changing, as it were, the joint tenancy thereof into a tenancy in common; and by operation of law making the members of the previously undivided family a divided family, in respect of such property.

1866.
 APPOVIER
 v.
 RAMA SUBBA
 AIYAN.

property, and to eject three of the Defendants (the present Respondents) from the three several divided shares which they held of such property, under a deed of partition made in the year 1834, to which deed the Appellant was a party.

The validity of the partition made in pursuance of this deed was the main question in the suit. The Appellant sought to invalidate it, principally on the ground that such deed of division being only partially acted on was, therefore, wholly void; that certain adoptions, by which three of the parceners became members of the family when undivided, were contrary to Hindoo law; that the Appellant was a minor at the date of that partition; and in the event of those points being decided in favour of the Appellant, he supported his claim to a moiety of the property by relying on a partition alleged to have been made in the year 1806, by the then members of the family.

The Defendants to the plaint were fifty-nine in number, and the five Respondents were the first-named five Defendants; the rest of the Defendants were severally holders of mortgages, and other derivative and subordinate interests in the different shares taken by the parceners under the division made in 1834.

The facts were these :—

The common ancestor of the Appellant, the third Respondent's husband, and of the fourth and fifth Respondents, was one *Sitaramien*, who died, leaving six sons. These sons formed an undivided family, consisting of six branches, who, after the death of *Sitaramien*, held and enjoyed the family property in common.

In the year 1806, the family being then undivided

and the first, second, and third sons of *Sitaramien*, the common ancestor, being dead, their three sons, together with the three surviving sons of *Sitaramien*, came to a division of the family property, upon which the Appellant relied as the foundation of his claim. This transaction was held by the several Courts of *Sudder Ameen*, the *Zillah*, and the *Sudder Dewanny*, to have been a mere temporary arrangement, and not intended to be permanent, and its purpose being served, a reunion of the family ensued, after which the parceners continued to hold the property as an undivided family until the year 1830.

On the 30th of *September*, 1830, a *Kararnamah* (agreement) was entered into by the then surviving members of the family, for a prospective division of the family villages at some future period, as might be agreed on, with joint cultivation and engagement thereof in the six equal shares in the meanwhile. Nothing, however, was done to carry out this intended division. At the date of this agreement, the Appellant was a minor, and a party to it by his Mother, as his guardian.

On the 22nd of *March*, 1834, a further deed of division was executed between the parties to the deed of 1830, which the Appellant, being then of age, executed. By this partition the property was divided into six equal shares, which were separately allotted to the Appellant, and the first, second, and third Respondents, and the fathers of the fourth and fifth Respondents.

On the 19th of *November*, 1855, the Appellant filed his plaint in the Court of the Principal *Sudder Ameen* of *Tinnevelly*, against the Respondents and others not parties to the appeal, stating the transac-

1866.

APPOVIER

v.
RAMA SUBBA
AIYAN.

1866.
 APPOVIER
 v.
 RAMA SUBBA
 AIYAN.

tion of 1806, and alleging that in *March*, 1834, the Appellant and the second Respondent, *Venkatarama Ayan*, since deceased, were minors, and that during their alleged minorities *Sitaramien*, who had been adopted by the Appellant's elder brother, was, while a minor of only five years, adopted without authority, by that brother's widow, *Ananta Ammal*, the third Respondent, during pollution after her husband's death. And that in *March*, 1834, during the minorities of the Appellant and the second Respondent, *Sitaramien*, through his mother, joined in the partition, and redistributed the family property into six shares contrary to law, and exchanged deeds of partition, but that such deeds were not put in force. The plaint then alleged circumstances to show that certain other adoptions made by some of the family were illegal and invalid ; but which fact from the course the suits took, both in the Courts below and before the Judicial Committee, it is not necessary to specify ; and then went on to allege, that the Appellant was the *Dwamushyayana* or heir, both to his adoptive father and his natural father, and was entitled, as such, to a moiety of the property in question, which he thereby claimed, the other moiety falling to the first and second Respondents ; and prayed for a decree for an account of his moiety of the property described in the plaint, authorizing him to enjoy his share according to the local usages.

The effect of the case made by the plaint was, that by the disqualification of *Sitaramien* and the fourth and fifth Defendants, three of the parties to the partition of 1834, through the alleged illegality of their several adoptions, to reduce the family from six to three members, and, having regard to the Appellant's

double capacity of heir to his natural as well as to his adoptive father, the family property was reduced to four shares, of which two would belong by proprietary right to the Appellant, as such conjoint heir, and the other two to the first and second Defendants.

The Defendants, the present Respondents, filed separate answers. The first Defendant denied the validity of the second Defendant's adoption, and consequently his right to any share, and claimed a moiety of the family property for himself. The second Defendant pleaded his minority at the time of the partition of 1834, and alleged that the division of 1806 had been confirmed by the Courts.

The fourth Defendant relied on the following points :—First, that the suit was barred by the Regulations of Limitation, the cause of suit having arisen in 1834, and the suit not having been commenced within twelve years. Second, that the family was a divided one. Third, that the adoption of the fourth Defendant was valid ; and fourth that the Appellant's plea of *Dwamushayana* was unsustainable. He further stated, that the Appellant's allegation of his being a minor in the year 1834, was false ; that he attained his full age in 1832-3, and that ever since the partition of 1834 the property in question had been enjoyed by the parceners as a divided family according to the division then made, as had been admitted by the Appellant in certain proceedings and depositions before the Revenue authorities ; and that the Appellant, if dissatisfied with that division, ought to have brought his suit within twelve years. In respect of the adoption of the fourth Defendant, the answer stated, that the adoption (the fact of which was admitted in the

1866.

APPOVIER

v.

RAMA SUBBA
AIYAN.

1866.
APPOVIER
v.
RAMA SUBBA
AIYAN.

plaint) took place in *January*, 1836, when he was five years old, and before the performance of his tonsure ; and that he being, at the time of filing the answer in 1856, twenty-five years old, the interval since the adoption was twenty years, and exceeded twelve years, after which lapse of time an adoption was unimpeachable. The answer further stated, that the deed of division in 1806 was passed simply in order to evade the demands of Creditors, but was not effectuated ; and that, after the pressure of the Creditors had ceased, the parceners cancelled the deed of 1806, and agreed by the deed or agreement of 1830 to hold and enjoy the property in six shares, and to live separately ; that, conformably to that agreement, the parceners, by the deed of the 22nd of *March*, 1834, divided the property into six shares, and thenceforward held and enjoyed the same in severalty accordingly, and had ever since lived separately, and paid fiscal dues separately. That after the division of 1834 a dispute arose among the parceners in regard to the house grounds, and that an agreement was passed to the effect that they should enjoy them according to the lots cast by them of their own accord in *April*, 1834, and that in other respects the division of 1834 should be adhered to ; and he further stated that the Appellant had attested a deed of mortgage made by the fourth Defendant of his share of the property in 1840 ; and that from such fact, in conjunction with the allegation in the plaint, that the Appellant and the first and second Defendants had separately mortgaged certain portions of the original-family property, it was evident that the Appellant was a divided member of the family. The answer also referred to Hindoo law authorities, in sup-

port of the validity of the adoptions impeached by the plaint ; and averred, with reference to the allegation of the Appellant, that he was a *Dwamushyayana*, or heir of two fathers, that the claim was untenable.

The answer of the fifth Defendant relied upon the Regulation of Limitations, and insisted upon the validity of his own adoption, as conformable to the custom of the southern countries, to adopt nephews (sisters' sons), the validity of the second Defendant's adoption, which stood on the same footing, being admitted by the Appellant. He claimed also the benefit of the fourth Defendant's answer, as a sufficient defence against the Appellant's claim.

The answer of the third Defendant relied on the agreement for partition of 1830, to which her deceased husband and the five other parceners were parties ; the subsequent agreement of 1834, and upon the continuous enjoyment of the property, according to the division of 1834, down to the commencement of the Appellant's suit. She relied also on admissions of her title to one-sixth, made by the Appellant, in the course of various proceedings before the Officers of Revenue. She denied the alleged adoption of *Sitaramien* when under pollution ; and she averred that in *February*, 1834, when her husband, *Ramakistnien*, was laid up with illness, he, in his own proper person, made the adoption as declared by *Sastras*, and died subsequently. She denied also the legality of the claim of the Appellant to be *Dwamushyayana*, or son of two fathers, and stated that the custom of *Dwamushyayana* did not exist in the District where the family property lay, and that the Appellant could not

1866.

APPOVIER

v.

RAMA SUBBA
AIYAN.

1866.
 APPOVIER
 v.
 RAMA SUBBA
 AIYAN.

on such ground lay claim to a moiety of the estate. This Defendant claimed also the benefit of the answer of the fourth Defendant.

The cause was heard by the Principal *Sudder Ameen* of *Tinnevelly* (*T. Sundara Charlu*), and on the 14th of *September*, 1857, the plaint was dismissed. The *Sudder Ameen* was of opinion, that whatever might have been the nature or character of the alleged division of 1806, the division of 1834 was binding on the Appellant, by whom it had been executed in *propria persona*, by affixing his own mark, and not by his guardian, as was the case with the agreement of 1830. It was observed by the *Sudder Ameen* that the Appellant was of the age of discretion at the time of entering into the agreement of 1834; that in the Exhibit XVII., which was a petition presented by the Plaintiff to the *Talug* authorities, he admitted the division of the property into six shares by the agreement of 1834, and also the fact that some of the lands were afterwards enjoyed in common, and that some were divided and enjoyed in six shares; that under these circumstances the Plaintiff and the first, second, and third Defendants, and the fathers of the fourth and fifth Defendants, became divided members; that notwithstanding the statement of the Plaintiff at the hearing, that the six sharers did not under the division of 1834 enjoy any portion of their respective shares, or the produce thereof, and that he the Plaintiff enjoyed a greater share, such illegal enjoyment could be of no prejudice to the shares of the lawful coparceners, and could confer on the Plaintiff no title to a greater share to which, under the Hindoo law, he could not become entitled, for that, according to the text of the Hindoo law, a person who for ten years

lived separately, and performed ceremonies separately, must be considered as divided, and that the Plaintiff had in his deposition admitted that ever since the division of 1834 the parceners had lived separately, and performed the anniversaries, death, &c., separately. As regarded the adoptions of the fourth and fifth Defendants, to which the Appellant took exception, the Judge held that all these adoptions were valid by the Hindoo law. As to the adoption of *Sitaramien*, which was impeached on the ground of its having been made by the third Defendant while under pollution after her husband's death, the *Sudder Ameen* considered it proved that this adoption was not made by the third Defendant at all, but by her husband, *Ramakistnien*, himself, shortly before his death, and he held that as *Sitaramien* was dead, the third Defendant, as the widow of *Ramakistnien*, was a parcener under the division of 1834.

The Appellant appealed to the *Zillah* Court of *Tinnevely*. The appeal was heard before Mr. *E. Story*, the Civil Judge, and the decree of the Court below affirmed, on the 21st of *May*, 1858. The judgment of the *Zillah* Court proceeded on the ground that the Appellant was, by his own showing, seventeen years of age at the date of the division in *March*, 1834, and, not being a ward of Court, became of age when sixteen; that the division of 1834 was shown to have been acted upon by all parties, including the Appellant; that all the impeached adoptions took place more than twelve years prior to the institution of the suit, and could not, therefore, after such a lapse of time, be brought into question; that the equality or inequality of the division of 1834 was of no moment, and that, as the Appellant had not proved his own title to the shares of the third, fourth,

1866.
 APPOVIER
 v.
 RAMA SUBBA
 AIYAN.

1866.
 APPOVIER
 v.
 RAMA SUBBA
 AIYAN.

and fifth Respondents, it mattered not whether their defence had or had not been substantiated.

From this decree the Plaintiff appealed to the *Sudder Dewanny Adawlut* at *Madras*.

On the 26th of *April*, 1860, that Court, consisting of Messrs. *Frere*, *Strange*, and *Beauchamp*, pronounced the Court's decree ; after stating the facts of the case, the Court delivered their judgment upon the question of division in 1834, in the following terms :—" After hearing argument on either side, the Court consent to extend their investigation to the consideration of the various other points of law embraced in the case, namely, the circumstances of the family as to division, and the validity of the disputed adoptions. It is attempted on the part of the Plaintiff's Counsel to maintain his rights under the alleged division of 1806. The Court, however, view the plea as untenable. It is not in accord with the form in which the plaint has been drawn up, which puts the family forward as virtually undivided, and calculates the shares as consisting of six equal parts. It is pleaded that the Plaintiff is not bound by the arrangement of 1834, on the ground that he was then a minor. This plea has been negatived in the Lower Courts, it having been found by the Exhibit XIX. that the Plaintiff had accounted himself twenty-nine years of age in 1846, which would show him to have been more than sixteen years old, or in his majority, in 1834. The Court observe also that in the years 1845, 1846, and 1847, the Plaintiff has spoken of the division of 1834 as a transaction in which he had been concerned, and has stated that it had in part been carried out, as appearing by the Defendants' Exhibits XVII. and XIX., and Plaintiff's Exhibit Z, so that

the Plaintiff is precluded now from disputing the fact or questioning his liabilities under it. At the hearing of this appeal the objection taken to the adoption of *Sitaramien* has been withdrawn, and it is found that on previous occasions, namely, in the aforesaid Exhibits XVII. and Z, the Plaintiff has recognized this adoption. The fact of the family being in a divided state furthermore vests this share in the third Defendant, whatever may be said of the adoption of *Sitaramien*, who has demised. The adoption of the fourth and fifth Defendants occurred in the years 1837 and 1842 respectively. In the Exhibit Z, dated in 1847, the Plaintiff has mentioned that illegal adoptions had been made in the family, but without specification of such adoptions. It appears, however, that on a previous occasion, namely, in 1846, the Plaintiff admitted these parties to be shareholders, as shown by Exhibit XIX., without in any way objecting to their position in the family; and in Exhibit XXVI., which is a family tree made use of by Plaintiff, their names appear as members of the family. The Court is of opinion, that the Plaintiff is precluded from challenging these adoptions, by his own past acquiescence therein. The second Defendant has demised; but as his share forms the subject of the appeals Nos. 191 and 192, of 1859, it is not necessary to deal therewith in the present suit. The Court so far amend the decrees below as to award to the Plaintiff a sixth share in the villages mentioned in the Exhibit XLII. as still undivided. The Plaintiff's suit having been based upon a misrepresentation of his title, and it not appearing that, had he confined his demands to so much as was really his due, compliance therewith would have been refused by the Defendants, the Court

1866.

APPOVIER

v.
RAMA SUBBA
AIYAN.

1866.

APPOVIER

v.

RAMA SUBBA
AIYAN.

resolve to charge the Plaintiff with the whole costs of the suit."

The Appellant applied to the *Sudder Dewanny Adawlut* for a review of the above judgment, but the petition was rejected by an Order, dated the 5th September, 1860.

From the above decree and the Order of the *Sudder Court of Madras*, refusing a review of judgment, the present appeal was brought.

Mr. *W. W. Mackeson*, for the Appellant :

The question of disability arising from infancy raised in the Court below is abandoned. The principal points now relied on are, first, as to the effect of the alleged deed of partition made in the year 1834. Upon this question, it is submitted, the Courts in *India* proceeded in their judgments on a false basis, namely, that there was a complete and valid division by the deed made in the year 1834. Such was not the case; no entire division of the family property was made by metes, and bounds, and the evidence shows the deed did not operate as a complete division. It has been ruled by the Courts in *India*, that the mere fact of the registry of an estate in separate portions is not conclusive of the fact of division. A partial and incomplete division is no division at all. *Strange's Hindu Law*, Vol. I. pp. 195, 209 [2nd Ed.]. *Strange's Hindu Law*, Vol. II., p. 387. 1 *W. H. Macnaghten's Princ. of Hindu Law*, p. 53. *Doe dem. Remmout Seat v. Bulram Chunder (a)*, *Prawnkissen Mitter v. Sreemutty Ramsoondry Dossee (b)*. The mere execution

(a) Morton's Rep. 80.

(b) 1 Fulton's Rep., 110, and see authorities collected on this point, 6 Moore's Ind. App. Cases, 546.

of a deed of division, therefore, if not acted upon, cannot alter the condition of an undivided family. The Hindoo law recognizes no arrangement as constituting a divided *status*, nothing short of entering upon the enjoyment of the respective shares, and that under a valid division. Here the deed of 1834 of the intended division, having been only partially acted upon, is void. Moreover, the intended division was unequal, which also invalidates the partition.

Secondly, with regard to the alleged adoption of the fourth and fifth Respondents. It is submitted that there is no evidence to support that fact, but if so, they were invalid in law. There can be no adoption of a sister's son. *Strange's "Manual of Hindu Law,"* p. 22, pars. 84 and 86. [2nd Ed.] "*Princ. of Hindu and Mohammadan Law,*" p. 70, by *W. Macnaghten* [Ed. by *H. A. Wilson*]. *Sutherland On Adoption*, p. 35. *Strange's Hindu Law*, Vol. I. pp. 83, 84. [2nd Ed.] *Ramalinga Pillai v. Sadasiva Pillia* (a). *Narasammál v. Balarámácharlu* (b). The adopted must be one who might have been issue of the adopter, as the child of one whom the adopter might have married. *Strange's Hindu Law*, Vol. I., p. 83. The objection as to tonsure having taken place before adoption is now also abandoned. As a general rule, tonsure places a son inextricably in his family, but investiture prevents adoption. *Strange's "Manual of Hindu Law,"* p. 26. *Sutherland On Adoption*, p. 124. *Strange's Hindu Law*, Vol. I., p. 89.

Again, the decree is wrong, as the Appellant is entitled as *Dwyamushyayana*, or son of two fathers, to seven-twelfths instead of one-sixth, as decreed by the *Sudder Court*. As a general rule, the adopted son

(a) 9 Moore's Ind. App. Cases, 506.

(b) 1 Stoke's Mad. H. C. Reps., 420.

1866.
APPOVIER
v.
RAMA SUBBA
AIYAN.

1866.
 APPOVIER
 v.
 RAMA SUBBA
 AIYAN.

cannot be heir in his natural family, but only to his adopted father ; be it is otherwise where the natural and adoptive fathers agree that the adopted shall retain his natural rights, or belong to both fathers. If a man having two sons gives away one, and his other son die, and their issue fail, the adopted son may resume his natural rights. *Sutherland On Adoption*, pp. 127, 187.

Mr. *Prendergast*, for the third, fourth, and fifth Respondent :

The family of the parties to the suit was a divided family. The right to impugn the validity of the partition deed of 1834, if any error existed, which is denied, was barred by lapse of time under the law of limitation, as well as by the acquiescence of the parties before the commencement of the suit. The partition made in 1834 was made with the personal concurrence of the Appellant, who, it is acknowledged, at that time was under no legal disability. He is, moreover, as appears from the evidence, estopped, by his own acts and declarations subsequent to the partition, from impugning its validity. With regard to the adoptions which the Appellant impugns, the evidence in the cause is sufficient to establish their validity ; but if the Appellant had any right to question their validity, such right is barred by the lapse of time before the commencement of the suit. The decree, therefore, of the *Sudder Dewanny Adawlut* was in all respects just and proper, and ought to be affirmed, and this appeal dismissed with costs.

The Right Hon. Lord WESTBURY :

This is an appeal brought from a decree of the *Sudder Court at Madras*, which affirmed the decree of

the *Zillah* Court of *Tinnevelly*, which itself affirmed the original decree of the *Sudder Ameen* of that District. It is, therefore, an appeal from three decrees, unanimous in rejecting the claim of the Appellant.

1866.
 APPROVIER
 v.
 RAMA SUBBA
 AIYAN.

The present appeal is founded upon an allegation that certain property (shares in which are claimed by the Appellant) continues the undivided property of the family of which the Appellant was a member, and which was originally an undivided family. The foundation of the defence to the Appellant's claim is an instrument, which we will call, for the present purpose, a deed of division, dated the 22nd of *March*, 1834.

Certain principles, or alleged rules of law, have been strongly contended for by the Appellant. One of them is, that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds.

Their Lordships do not find that any such doctrine has been established; and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject, to which the title is applied.

According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the

1866.

APPOVIER
v.
RAMA SUBBA
AIYAN.

Collector or receiver of the rents, a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with ; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

With reference to the cases in the *Madras* High Court which have been relied upon by the Appellant, we believe, upon an examination of them, that there is not to be found in any one, clearly and affirmatively, the doctrine contended for with reference to an agreement for the conversion of joint ownership into separate ownership, namely, that such agreement is of no effect to convert an undivided family into a divided family without an actual partition.

In the last case cited and relied upon by the Appellant, decided in the month of *February*, 1865, in the High Court at *Madras*, that Court refuses to assent to the doctrine that nothing short of an absolute partition by metes and bounds in the lifetime of the different members will make the shares of the property divided.

Undoubtedly their Lordships would be unwilling to reverse any rule regarding property which had been

long and consistently acted upon in the Courts of the Presidency, but it is impossible for them here to come to the conclusion that the doctrine contended for by the Appellant is to be considered a rule, which has been so accepted or acted upon by those Courts. Upon an examination of the cases, it will be found that in some the deed of partition was not attended by any subsequent act, and had been repudiated by subsequent conduct of the parties ; and in another of the cases cited, where there had been a decree of partition, it seems that the decree of partition had been abandoned.

If, then, the rules derivable from the true theory of an undivided family are such as we have described, and are not at variance with any settled course of legal decision,—let us apply those rules to the deed upon which this case in reality depends.

The Appellant admits that the deed was operative with regard to a certain number of villages, because, he says, those were actually divided ; but he contended it was not a deed which made the family a divided family with regard to the rest of the villages, because it has not been followed by actual partition.

It is necessary to bear in mind the twofold application of the word “division.” There may be a division of right, and there may be a division of property ; and thus, after the execution of this instrument, there was a division of right in the whole property, although, in some portions, that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition.

The deed, after dealing with the villages that were

1866.
 APPROVIER
 v.
 RAMA SUBBA
 AIYAN.

1866.

 APPOVIER
 v.
 RAMA SUBBA
 AIYAN.

intended at once to be the subject of an actual partition, proceeds thus:—"But inasmuch as it is not intended to divide now"—What is the meaning of the words, "divide now?" Clearly, to make the same partition of the villages that follow as had previously been directed to be made of the villages which precede. "But inasmuch as it is not convenient to divide now our moiety of the villages" (then follows an enumeration of the villages), "we shall divide every year in six shares the produce of them, and enjoy it, after deducting the *Cirkar kist* and charges on the villages." Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the *status* of the family *quoad* this property. The produce is no longer to be brought to the common chest, as representing the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family, who are thenceforth to become entitled to those definite shares. Thus—using the language of the English law merely by way of illustration—the joint tenancy is severed, and converted into a tenancy in common.

Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right.

The words with which this instrument of the 22nd of *March*, 1834, concludes, manifest an intention to become divided, for, after expressing that they have

already divided the silver and brass utensils, the parties use these words:—"We have henceforward no interest in each other's effects and debts except friendship between us." We find, therefore, a clear intention to subject the whole of the property to a division of interest, although it was not immediately to be perfected by an actual partition.

We have examined the whole of these papers with great anxiety and care; we have been very much assisted by the arguments at the Bar; and by the able manner in which the cases on both sides have been prepared. We have no doubt of the true principle which is applicable to the matter, or of the legal effect of this deed of *March*, 1834. It operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, viz., that that is sufficient to make a divided family, and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject-matter.

Upon all these grounds we concur with the decisions of the Courts below, and we think it right to advise Her Majesty to dismiss this appeal, and to dismiss it with costs.

As the Appellant admitted, with great propriety, that, provided the conclusion of their Lordships was that the property was divided, then the shares which he now claims have followed a course of descent with which he has no right whatever to interfere,—we say nothing upon the question of adoption. Her Majesty's Order will merely confirm the decree of the Court below.

1866.

APPOVIER

v.

RAMA SUBBA
AIYAN.

ASHRUFOOD DOWLAH AHMED
 HOSSEIN KHAN BAHADOOR, and
 WAZEEROON NISSA BEGUM ... } *Appellants,*

AND

HYDER HOSSEIN KHAN, *alias*
 ACHEY SAHIB ... } *Respondents.**

*On appeal from the Court of the Judicial
 Commissioner of Oude.*

25th Nov.
 1866.

According to the Mahomedan law, the presumption of legitimacy from marriage, follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child: but this

THE suit out of which this appeal arose was originally brought in the Civil Court at *Lucknow*, by the Appellants, the son and daughter, and, as such, claiming as sole joint heirs of *Nawab Ameenood Dowlah*, deceased, formerly *Vizier* and Prime Minister of the late King of *Oude*, against the Respondent, who

* Present :—Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor :—The Right Hon. Sir Lawrence Peel.

presumption is not ante-dated by relation. An ante-nuptial child is illegitimate; a child born out of wedlock is illegitimate, but if acknowledged by the father he acquires the *status* of legitimacy. Such acknowledgment may be express or implied, directly proved or presumed.

By the same law, the denial of a son either of *Nikalee* (regular), or *Mootahar* (irregular) marriage after an established acknowledgment, is untenable, though supported by a deed of disclaimer and repudiation by the father.

Suit by the son and daughter of *A.*, a Mahomedan of the *Sheah* sect, claiming as his sole heirs, for a declaration of the illegitimacy of *B.*, who claimed to be also a son of *A.*, and co-heir, as the issue of a *Mootah*, or inferior marriage, and as having been acknowledged by *A.* in his lifetime as his son. Such marriage, not having been proved to have taken place previous to the birth of *B.* and the acknowledgment of the sonship not being satisfactorily proved, held by the Judicial Committee, reversing the decision of the Court of the Judicial Commissioner

claimed to be a son of the deceased *Nawab*, and as such a co-heir with the Appellants, to establish their right of inheritance and a declaration of the Respondent's illegitimacy.

The parties were Mahomedans of the *Sheah* sect. The Respondent claimed to be a son of the *Nawab Ameenood Dowlah*, but the Appellants alleged that he was illegitimate; he, however, relied on a *Moottah* (or irregular) marriage of his mother with the *Nawab*, and his consequent birth in wedlock, and insisted that the *Nawab* had in his lifetime acknowledged him as his son; and he further relied on a decision of the Civil Judge at *Lucknow* in a summary suit for the administration of the goods of the *Nawab*, under the Acts, Nos. XIX. and XX. of 1841 and X. of 1851, by which he had obtained a certificate of joint administration and title with the Appellants, subject to their right to bring a suit to prove his illegitimacy. The Appellants denied the *Moottah* marriage, and the declaration and acknowledgment by the *Nawab* of the Respondent as his son, and they set up and relied on a deed of disclaimer and repudiation of the Respondent, executed by the *Nawab*, in his lifetime, denying that the Respondent was his son, which deed was proved in the suit.

The suit was tried and a verdict given by a *Punchayet*, acting as a jury, the constitution of which was

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

of *Oude*, that *B.* was not entitled to any share of the property of *A.*; notwithstanding that he had been put in possession of a third by a decree in a summary suit for the administration of *A.*'s estate.

Held also that the *onus* of proof of his illegitimacy was upon the Plaintiffs in such subsequent suit.

Where a summary suit is instituted to enforce a claim to possession of property, and the question in dispute necessarily involves the right, the Claimant ought to be directed at once to proceed in a regular suit, and not to be left to proceed under the Acts, Nos. XIX. and XX. of 1841, and X. of 1851, which do not determine the right, but only give possession to the *prima facie* heirs.

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

thus described by the Civil Judge: "Each party named ten, and thus we had an array of twenty of the first Mahomedans at *Lucknow*, including the High Priest and another Priest of high authority. Challenges were allowed till only five remained on each side, and every man of this panel, ten in all, was mutually approved by the parties." The fact of a *Moottah* marriage, by the *Nawab*, with the Respondent's mother, a person of low station in life, and originally one of his menial servants, was established, but there was a failure of proof that such marriage preceded the birth of the Respondent; the effect of the evidence upon that point, as well as upon the question of his acknowledgment by the *Nawab*, and of the deed of repudiation, is fully stated in their Lordships' judgment. On the four issues put to them on these matters in the Court below, the *Punchayet* found, first, that the *Moottah* marriage took place after the Respondent's birth; secondly, that no acknowledgment by the deceased *Nawab* that the Respondent was born of his body had been proved, according to the conditions of law, and that, therefore, no deed of repudiation was correct; thirdly, they found that it was not proved that the Respondent was a son begotten of the body of the deceased *Nawab*; fourthly, they found that had sonship been proved according to law, then, after payment of the marriage settlement of the *Muskoohah* wife, the son would have received an equal share of the residue with the other son; but, by law, an adopted son had no legal claim to a share, provision depending on the pleasure of the heirs.

It appeared that the following question was put to the High Priests, who were of the jury:—What would

constitute proof of sonship, according to the *Sharrah*? and they replied, that had the *Nawab* distinctly stated the Defendant to be his son, whether orally or in writing, that would have been conclusive; or had the son been the issue of the Master by his slave girl, that would also create an heir; or if he was admitted to his right by the acknowledgment of the other heirs, that would suffice.

The Civil Judge, Mr. *Fraser*, by his judgment, dated the 6th of *June*, 1861, stated his concurrence in and approval of the verdict of the jury, as follows:—“If in my own opinion, I differed materially from these findings on the issues, I should still hesitate to touch the unanimous verdict of such a strong body of intelligent and independent Mahomedans, but as my views are substantially the same as theirs, I have no hesitation in accepting their verdict;” and he decreed in favour of the Appellants, rejecting the claim of the Respondent, whom he declared illegitimate, and cancelled the summary decision recognizing him as a joint heir with the Appellants to the late *Vizier's* estate.

The Respondent appealed to the Judicial Commissioner of *Oude*, and the Commissioner, Mr. *Campbell*, by his decree, dated the 12th of *July*, 1861, reversed the decree of the Civil Judge, and held the Respondent legitimate. The material part of his judgment was in these terms:—“In my opinion, in a case like this, both under the well-ascertained principles of the Mahomedan law, and in the form in which the case came before the Court, the *onus* of rebutting the ordinary legal presumption of legitimacy, by proving illegitimacy, lay entirely on the Plaintiffs. The *Punchayet* was not a regular Jury, but a selected body very irregularly constituted, several of them having been before mixed up in the case, and having

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN,

during the trial also given testimony as witnesses. They have also mixed up the law and the fact. As I put the *onus* of proof, their findings—*i.e.* that it is not proved that there was a marriage before birth, and that it is not proved by legal witnesses that the Appellant (Defendant in the suit) was the son of the deceased—are of no avail. They do not find it proved that, in fact, the Appellant was not the son and was unlawfully begotten. The only point they find sufficiently is, that the deed of repudiation is correct; and if by that they mean that it is legally effective, the question is one of law, not of fact. In my opinion, the question being, whether the Appellant is deceased's legal son or not, the subsequent deed of repudiation is of no avail at all, except as evidence affecting the testimony on the main issue, and I cannot take that deed as ground for decision. On the other hand, as a matter of fact, I think it perfectly clear, that the deceased and the Defendant's mother cohabited continuously together, that the Appellant was born during such cohabitation, and that, while no ceremony of marriage is proved, it is certain that for many years (subsequently to the birth) we find the deceased and the woman to have been without doubt man and wife, and the Appellant brought up as their son. The question, then, is—under such circumstances, does the Mahomedan law presume a marriage before birth, or rather before conception? The weight of authority goes to show, that even a *Soonee* regular marriage would be presumed from the cohabitation, without any subsequent proof of marriage. Infinitely stronger is the presumption of a *Sheah Moottee* marriage, backed by the undoubted subsequent existence of such a marriage. Both in fact and in law, I am clear, that I must presume that there was such a

relation as would constitute a *Sheah Moottee* marriage. I find for the Defendant, and reverse the decree."

The present appeal was from this decree.

The Respondent put in no appearance, the appeal, therefore, was heard *ex parte*.

Mr. *Leith* (Sir *R. Palmer*, Q. C., with him) for the Appellants.

The decree of the Judicial Commissioner proceeds upon the fallacious assumption that by the Mahomedan law a previous marriage with the Respondent's mother was to be presumed from continued cohabitation, so as to legitimize issue born during such cohabitation. Here, however, no such cohabitation was proved, previous to the birth of the Respondent, between his mother and the late *Vizier*. Neither was it proved that he was the son of the *Vizier*. His mother was a widow, and, therefore, he might have been the son of her deceased husband. Again, the jury found that the *Moottah* marriage took place after his birth, and that fact, therefore, necessarily rebuts the legal presumption of parentage from cohabitation, *Macnaghten* on "Moohumadan Law," p. 58, which might otherwise arise, that a marriage took place previous to birth, and distinguishes the case from *Mirza Qaim Ali Beg v. Mussumaut Hingun* (a), *Khajah Hidayut Oollah v. Rai Jan Khanum* (b), *Jeswunt Sing-jee Ubby Sing-jee v. Jet Sing-jee Ubby Sing-jee* (c). The case of *Mahomed Bauker Hoossain Khan Bahadoor v. Shurfoon Nissa Begum* (d) is on all-fours with the present. There this Tribunal held, that in the absence of evidence of mar-

1866.
ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

(a) 3 Ben. Sud. Dew. Rep. 152.

(b) 3 Moore's Ind. App. Cases, 295.

(c) 3 Moore's Ind. App. Cases, 245.

(d) 8 Moore's Ind. App. Cases, 136.

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

riage, or circumstances of a formal acknowledgment sufficient to found a presumption of legitimacy, such legitimacy could not be presumed. According to Mahomedan law, a marriage does not legitimize issue previously born. Legitimacy, when impeached, can only be established in one of two ways, either by showing that the legal presumption of a valid marriage can be deduced from proved continuous cohabitation, *Macnaghten* on "Moohummadan Law," p. 58, or sexual intercourse commenced previous to the period of conception; or, on the other hand, where there can be no such legal presumption, by proving an express declaration and acknowledgment by the alleged father that the child in his son: *Macnaghten* on "Moohumadan Law," pp. 61, 296. Here the *Vizier* by a deed expressly declared that the Respondent was not his son, but a person of unknown lineage. All the kindness and liberality shown by the *Vizier* towards the Respondent is accounted for, and referable to the fact that he was the son of the woman he had married. The *onus* of proving the legitimacy, notwithstanding the proceedings for the certificate in the summary suit, under Act, No. XIX. of 1841, was undoubtedly on the Respondent, and he has failed to establish his legitimacy. The decision of the Judicial Commissioner that the *onus probandi* lay on the Appellants, because they sought to set aside an unauthorized transfer of possession in a summary suit, was erroneous and unjust.

The consideration of their Lordships' judgment was reserved, and now pronounced by

The Right Hon. Sir JAMES W. COLVILE.

15th Dec.
1866.

This is an appeal from a decree of Mr. *Campbell*, made by him when Chief Judicial Commis-

sioner of *Oude*, which reversed a decision in favour of the Appellants, the Plaintiffs in the suit, made by Mr. *Fraser*, the Civil Judge at *Lucknow*. The case comes before their Lordships *ex parte*, and, difficult in itself, occasions by its being heard *ex parte* an increase of anxiety and difficulty. The Appellants are son and daughter, and as such, heirs of *Ameenood Dowlah, Bahadoor*, the late *Vizier* of the ex-King of *Oude*. The Respondent claims to be also a legitimate son, and as such a co-heir of the late *Vizier*, founding his claim on a *Moottah* marriage of his mother, and on his birth, in due course, as a son conceived in wedlock of that marriage. He relies also on the acknowledgment of him for many years by the late *Vizier* as his legitimate son. The Appellants deny the alleged parentage, legitimacy, and acknowledgment.

The suit which gave rise to this appeal results from a precedent litigation between these parties, of which some account is necessary to a complete understanding of the cause.

At the time of the *Vizier's* death, the Respondent was not *de facto* a member of his family, having been some time previously expelled by his reputed father, the *Vizier*, from the house, and renounced as a son, under a suspicion of a grave offence imputed to him. On that occasion the *Vizier* executed a formal instrument, which is described in the suit as "a deed of renunciation," declaring the Respondent not to be his son. At the time of the *Vizier's* death, the Respondent, whatever his legal *status*, was not *de facto* an apparent heir of the *Vizier*, and the possession of the *Vizier's* estate was, after his death, in some one or more of his undisputed heirs, and no risk of

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

disturbance from disputes as to possession seems to have existed.

A portion of the property appears from the statements on the record to have consisted of Company's paper, indorsed generally to the heirs of the *Vizier*. But this state of indorsement did not require the institution of a merely possessory suit. In this state of things the Respondent preferred a claim to be admitted as co-heir to a joint possession of the estate of the late *Vizier*, and his claim being disputed by the Appellants, this gave rise to a summary suit to enforce his claim to possession. If a suit of this kind, which cannot determine rights, be instituted where the actual possession is quiet, and where the question in dispute necessarily involves rights, the Claimant should at once be directed to proceed in a regular suit; for if he proceeds under the Acts subsequently referred to, an expensive and inconclusive litigation is the probable result.

It is unnecessary to go through the history of this previous litigation in detail, or to examine the correctness of the course adopted in its several stages. It was attended with varying success, and finally ended with a decree of Colonel *Abbott*, on appeal, in favour of the Respondent. That gentleman, the Commissioner and Superintendent of the *Lucknow* division, after referring to the Acts of the Indian Legislature, Nos. XIX. of 1841, XX. of 1841, and X. of 1851, under one or more of which the summary proceeding was instituted, observes of them: 'They cannot determine right, but they place the *primâ facie* heirs in possession, and leave the subject to litigation in the proper course of law.' This decision, then, was intended to establish a *primâ facie*

title in the Respondent as co-heir, leaving the right undetermined; but in this case no *pirmâ facie* title exists distinct from the complete title in dispute, the whole subject of litigation resting on legitimacy alone. The right to that *status* was left undetermined, and was to be decided in a regular suit, to which the Appellants were referred.

In consequence of this decision, the Appellants brought their suit in the Civil Court at *Lucknow*, on the 6th of June, 1861. The object of the suit, as it appears from the plaint, was to be relieved from the effects of that summary decree, and to establish the Respondent's illegitimacy, so that the proceeding went on in a somewhat inverted order, arising from a misunderstanding of the object of those Acts. The plea is not set out at length, but an abstract of it is to be found in Mr. *Fraser's* judgment. The issues, as also the findings, are carefully framed, and evidence an accurate knowledge of the Mahomedan law as to legitimacy. The first, second, and third issues are alone necessary to be stated here, as nothing which affects the decision of this appeal turns upon the fourth issue, which relates merely to the share, if legitimate, and a claim to maintenance, if illegitimate. The first, second, and third issues are as follows:—

First; did *Nawab Ameenood Dowlah* (deceased) contract *Moottah* with Defendant's mother before or after his birth?

Second; has the deed of repudiation (dated, 23 *Suffur*, 1272, *Hijree*) the effect of cancelling previous acknowledgment of Defendant's legitimacy, if such were made?

Third; if Defendant be not a legitimate son, is he an illegitimate son of deceased?

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

It was admitted on the pleadings that a *Moottah* marriage at some time had been contracted between the late *Vizier* and the Respondent's mother, but the Plaintiff stated in effect that the conception and birth of the Respondent preceded that marriage. The plea distinctly stated the marriage, though without assigning a date to it, and alleged the legitimacy of the Respondent as a child born of that marriage. The existence of a *Moottah* marriage, therefore, at some time was not contested, and the first issue, which by implication admits a marriage, is framed correctly on that state of the pleadings. The second issue, it may be observed, is also very correctly framed. It substitutes for the ambiguous word "sonship," which might include an illegitimate son, the word "legitimacy," and uses the word "acknowledgment" in its legal sense, under the Mahomedan law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy as a son. The first and second issues include the two legal grounds of legitimacy, viz., marriage and acknowledgment, to which the plea is limited. Acknowledgment in the sense of treatment, as evidence simply of marriage or of legitimation, could not have been included with propriety in the issues, though as evidence it would not lose any part of its efficacy by reason of the wording of the issues.

It is not necessary to state the evidence in detail, nor to weigh the conflicting direct evidence; since both Courts, viz., the Civil Court and the Court of the Commissioner, agreed in their view of the facts generally on which the decision turned, the latter adopting the facts as stated in the judgment of

Mr. *Fraser*. Mr. *Campbell's* judgment was founded mainly on the inferences which he drew from those facts.

Mr. *Fraser* was assisted in his decision of this important and difficult case by a *Punchayet*, as it is termed, formed out of twenty Mahomedan gentlemen, selected with care, and reduced to ten by five challenges on either side; and as the reduced number consisted of ten men, including the High Priest, and another Mussulman Priest, all of whom are stated to have been mutually approved on both sides, a more competent Tribunal could hardly have been appointed for the decision of such a case. Their opinion against the claim of the Respondent was unanimous. Their opinion had substantially the concurrence of the Judge, Mr. *Fraser*, who made it the ground of his decision, treating them as Assessors, and concurring in their finding.

On a question of Mahomedan law, so closely allied as it is with the religion of the Mahomedans, the opinion of Priests of the dignity of these would be entitled to respect, since they are unlikely to be ignorant of it, or consciously to swerve from it. Such a decision, therefore, creates a more than ordinary presumption in favour of its correctness. It cannot readily be supposed that the High Priests would sanction so irreligious an act, in the view of Mahomedans, as the sacrifice of a son's legitimate *status*, conferred by acknowledgment of a Father, to mere caprice, or to resentment working on the mind of the Father; and their decision does not seem to be open to the suspicion of a tendency in the members of the *Punchayet* unduly to augment a Father's power. Upon turning to the findings of the issues,

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR .
v.
HYDER
HOSSEIN
KHAN.

1866.
 ASHRUFOOD
 DOWLAH
 AHMED
 HOSSEIN
 KHAN
 BAHADOOR
 v.
 HYDER
 HOSSEIN
 KHAN.

they appear to furnish no ground for questioning the care, or learning, or impartiality of the *Punchayet*.

On the first issue, they find that the *Moottah* marriage took place after birth. Mr. *Fraser* says, that according to the stronger evidence impregnation took place during the service, and, therefore, *prima facie* before the marriage. The second finding is as follows: "We do not find that deceased's acknowledgment that *Hyder Hossein* was born of his body has been proved according to the conditions of the law; therefore, the deed of repudiation is correct." This finding, if it were construed literally, and disconnected from the context, would seem to favour the belief, which Mr. *Campbell* seems to have entertained, that the *Punchayet* may have been proceeding on some stricter rules of evidence, under the Mahomedan law, than the procedure of the Courts at *Lucknow* authorized; but there is no proof that such was the case, and it cannot be presumed that any rules of the Mahomedan law of evidence were adopted by them which they could not legally adopt. The presumption should be in support of the regularity of their course.

The rules of evidence of the Mahomedan law were not generally in force there: it cannot be inferred without proof that they meant to be governed by rules of evidence foreign to the Tribunal. The whole sentence must be read together. Their conclusion, "therefore, the deed of repudiation of correct," is a conclusion from the former part of the sentence, and they are plainly referring to that species of "acknowledgment" which the second issue embodies, viz., one of legitimation, and not one simply constituting a piece of evidence. This is explained also by what

follows in the statement of the Priests as to the law, constituting proof of sonship. They reply, "Had the *Nawab* distinctly stated Defendant to be his son, whether orally or in writing, that would have been conclusive." They say nothing here of any peculiarity of proof of such a statement as a necessary condition of its legitimating power. The conditions of law to which this passage probably refers, are those which are to be found in the 3rd Volume of the *Hedaya*, p. 168, title "Miscellaneous Cases," which treats of acknowledgment of parentage; and the terms "conditions of law" would refer on that supposition to "acknowledgment," and not to be the more immediate antecedent "proved." But supposing that the learned Commissioner was correct in his conclusion that the *Punchayet* had proceeded on some special rule of evidence under the Mahomedan law, applicable to acknowledgment of parentage, the rejection of their finding on that ground merely would not be reconcilable altogether with the opinion expressed by the Privy Council in their judgment, at p. 318 of the 3rd Vol. of Moore's Indian Appeals, in the case of *Khajah Hidayut Oollah v. Rai Jan Khanum*: "We apprehend," say their Lordships, "that in considering this question of Mahomedan law (that is, the question of legitimacy), we must, at least to a certain extent, be governed by the same principle of evidence which the Mussulman Lawyers themselves would apply to the consideration of such a question."

The general rules of evidence of the Mahomedan law did not prevail in the Courts in which that cause was heard, any more than they prevail in the Courts at *Lucknow*; but in relation to that particular subject, so intimately connected with family feelings

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

1866.
 ASHRUFOOD
 DOWLAH
 AHMED
 HOSSEIN
 KHAN
 BAHADOOR
 v.
 HYDER
 HOSSEIN
 KHAN.

and usages, that deference was recommended if not enjoined.

Taking the whole of this finding together, and viewing it with relation to the particular issue which it finds, it appears to do no more than say, "As sonship does not appear (that is as the Respondent is one of doubtful parentage), the deed of repudiation is correct, whereas it would have been untenable after an established acknowledgment;" this reconciles the opinion here expressed with that of the Mahomedan High Priest, who says that a denial of a son, either of a *Nikahee* or *Mootahee* wife, after an established acknowledgment, will, according to the Mahomedan law, be untenable.

On the third issue they find thus: "We do not find it proved that *Hyder Hossein* is a son begotten of the body of the deceased *Nawab*." The propriety of this finding with reference to the matter in dispute, viz., legitimacy, resolves itself into the question, whether, on the whole evidence in this cause, legitimacy ought to have been declared to be established. The consideration, therefore, of this part of the case is for the present postponed.

In the judgment of Mr. *Fraser*, he states, in the commencement of it, "that the *onus* of proof in this case was thrown on the Plaintiffs, for the Defendant had acquired the right of being regarded as one of the legitimate sons of the late *Nawab Ameenood Dowlah*, such being the summary judgment passed by the Commissioner." The reason assigned seems to admit the correctness of the general rule, and to assign to the Appellants the burthen of proving what is substantially a negative, to the inversion also, in this case, of the ordinary course of proceeding as to

possession. The title of the Respondent, if established, was one in privity with the Appellants' title. The mere fact of possession of a portion of the disputed property by either party was not a matter of any importance to the decision of the question on whom the burthen of proof rested in this cause; that depended on the nature of the issues.

Mr. *Leith* made this inversion of the usual order of proof a subject of complaint against the decision. In many cases, undoubtedly, an unauthorized transfer of possession would work serious injury and injustice to a Claimant; but in this particular case it does not appear that the mistake as to the transfer of possession, and as to that of the *onus probandi*, which, in the judgment of Mr. *Fraser*, it involved, worked any real injustice or imposed any difficulty on the Appellants from which they would otherwise have been free; and their Lordships' decision is unaffected by this objection.

This preliminary objection to the mode in which the case was dealt with below being removed, it becomes necessary to view the whole of the facts in proof in the cause; for the case really depends on a conflict of evidence, and the due application of presumptive proof. The facts on which the Commissioner grounded his decision he took from the judgment of Mr. *Fraser* in the Court below, but they require to be stated, with one not unimportant addition, the want of which was made, on the argument, a ground for questioning the correctness of his view of the facts.

It appears to have been a mere omission of statement; the fact does not appear to have escaped the attention of the Commissioner. The addition

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHA DOOR
v.
HYDER
HOSSEIN
KHAN.

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

required is this—that the mother of the Respondent entered the *Vizier's* family as a servant in a menial capacity, and served in that capacity for some time, and after some period of service was taken behind the *Purdah*. The *Vizier*, it may be observed, was then simply a *Darogah*, not much elevated in position above the woman whom he hired and afterwards married. The facts, then, when stated more fully, should stand thus: that the mother of the Respondent entered the service of the *Darogah*, afterwards the *Vizier*, in a menial position, as Cook; that she was a widow; that the date of her husband's death was not proved; that she went out in the course of her service into the Bazaar to make purchases, and was taken subsequently behind the *Purdah*; that the date of the commencement of her cohabitation with the *Darogah* was not proved; that the dates of her pregnancy and of the birth were not proved; that the date of the *Moottah* marriage was not proved; and that it was not proved that any change in her position or treatment occurred before the date of her pregnancy. There is, therefore, a total failure of proof whether marriage preceded or followed pregnancy. Mr. *Fraser* said that pregnancy commenced during the service. Mr. *Campbell* removed the difficulty by a presumption of an antecedent marriage. Can the defect of the evidence in this case be supplied by a presumption placing that marriage itself at a time anterior to pregnancy? This is the main question in the cause.

It is to be observed, in considering the propriety of strengthening the weakness of the direct proof by this last presumption, that the mother was living at the time of the trial, and that the date of her marriage

was a fact which she was competent to prove, as well as the time of the birth of her child. No explanation has been afforded by the Judges who have heard this cause why the evidence fails on these important points, or why that is to be worked out by a presumption from marriage which living testimony might support, especially in a case where the treatment has been interrupted, and an impediment of more or less weight interposed by the repudiation of the parentage by the reputed father. It would be an easy matter to legitimize a child conceived before marriage by withholding proof of the time of marriage, and resting on an inference from the marriage itself. These or similar reasons may have been present to the minds of the *Punchayet* when they found on the first issue, that the birth preceded the *Moottah* marriage. It is important to consider the real nature of such a document. It has no effect whatever on the *status* of a legitimate son, whether legitimate by birth or made legitimate by acknowledgment. The finding of the *Punchayet* does not contravene that position. Their finding on the issues as to acknowledgment and sonship leaves the Respondent in the position of a son of an unacknowledged father. On the *status* of such a son the renunciation may be operative according to the Mahometan law; but it is not conclusive, and may be contradicted and disproved, and does not seem to be more weighty in itself than a declaration by a deceased parent in a case of pedigree. The *Punchayet* say that the renunciation is correct, that is, that their law admits it to take effect; whereas in either of the other cases "the denial is untenable." It might be inferred from the proceedings of the *Punchayet* alone, that such an instrument is in use among the Maho-

1866.

ASHRUFOOD
DOLWAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

metans: a similar document was admitted in proof in a case which came before the Privy Council, *Jeswunt Sing-jee Ubby Sing-jee v. Jet Sing-jee Ubby Sing-jee* (3 Moore's Ind. App. Cases, p. 253). Had this deed of renunciation been evidence on which reliance could be placed as to the denial of sonship which it contained, then it might have sufficed to displace a mere presumption of legitimacy, founded on treatment as a son of one in truth illegitimate. It might be designed and suffice to remove a growing repute. That document, however, cannot be relied on. It was executed under great resentment; it spoke the mind of one irritated by a grievous sense of wrong, and it would be dangerous to give effect to such a document, so prepared and executed, and to place it in the power of an irritated man to bastardize his offspring by an instrument executed under a sense of wrong, especially amongst a vindictive race. It is so difficult to credit the story that the *Vizier* adopted the Respondent, who on that supposition would be the bastard son of a woman of low degree by some unknown father, that the insertion of that statement in the deed detracts greatly from its credit; an untrue account of the origin of the *Vizier's* connection with the Respondent gives rise to some degree of suspicion that the disclosure of the real state of the case might aid the Respondent's claim to be deemed legitimate.

As it appears, then, that the *Punchayet* below, and the Court which adopted its finding, attached an undue importance to this deed of renunciation, and as this undue estimate of its weight may have greatly influenced their findings on the other issues, the learned Commissioner seems to be substantially correct in forming his own judgment independently of the

findings, in which there had been a miscarriage. Whether he was correct in deciding the issues in favour of the Respondent, is a doubtful and difficult question. It would be desirable to know to what authorities, if particular cases were in his contemplation, Mr. *Campbell* refers.

Unfortunately he does not name any, but he refers to Mr. *Baillie's* Book on Inheritance as questioning the broad assumption that "mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring." This statement drops the important qualification "with acknowledgement."

The binding decisions on this subject must be looked for in the judgments of the Privy Council. No decision can be found there which supports so broad an assumption, or which, when rightly understood, is in conflict with the law, as stated by the Priests in this case.

The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive. The case of *Mahomed Bauker Hoossain Khan v. Shurfoon Nissa Begum* (8 Moore's Ind. App. Cases, p. 159), affirms this principle.

Their Lordships said in that case, which was one of legitimacy under the Mahomedan law:—"In arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof either of a marriage between the parents, or of any formal act of legitimation. Here there is, to their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference."

Their Lordships are not aware that these principles have ever been lost sight of in the Courts in *India*. They believe that they have been constantly observed by, and have guided the decisions of their Lordships in the Judicial Committee.

In the case in 3 Moore's Ind. App. Cases, p. 323, already cited (*Khajah Hidayut Oollah v. Rai Jan Khanum*), it is observed in the judgment:—"With-

out going into the question of the oral evidence, whether there was an express acknowledgment of the child by *Fyz Ali Khan*, as the son or not, there seems to be that which at least is tantamount to oral evidence of any declaration, because there is a consecutive course of treatment both of the mother and the child for a period of between seven and eight years, under circumstances in which it appears to their Lordships to be next to impossible that such a mode of treatment would have been continued except from the presumption of the cohabitation, and of the son being the issue of the loins of *Fyz Ali Khan*." The cohabitation alluded to in that judgment was continual; it was proved to have preceded conception, and to have been between a man and woman cohabiting together as man and wife, and having that repute before the conception commenced; and the case decided that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment, sufficed to prove legitimacy. The presumption throughout the whole judgment is treated as one of fact.

It would be much to be regretted if any variance on this important matter arose between the decisions of the Courts and the text of the Mahomedan law of legitimacy as understood and declared by the High Priest, connected as their law and religion are. Such a variance exists between the law as expounded in this case, and the position contained in Mr. *Campbell's* judgment, that "mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring." This position, if established, would have sufficed to legalize the *status* of the Claimant in the case before referred to,

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHA DOOR
v.
HYDER
HOSSEIN
KHAN.

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

Mahomed Bauker Hoossain Khan v. Shurfoon Nissa Begum (8 Moore's Ind. App. Cases, p. 159), for in that case there was abundant evidence of continued cohabitation between the Father and the Mother of the Claimant; but as there was no proof in that case either of marriage or of acknowledgment, he was adjudged to be illegitimate.

This case, then, must be determined on the principles of evidence which are applicable to presumptive proof, every reasonable legal presumption being made in favour of legitimacy. The force of presumptions of fact as evidence will vary with varying circumstances, and cannot well be fixed by decision. The Courts have properly presumed, in many cases, both marriage and acknowledgment; for to presume acknowledgment, and to consider treatment as tantamount to it, is virtually the same thing. The loss or destruction of evidence by time or design is as likely to take place with respect to acknowledgment as with respect to any other subject; and whilst matters of the highest import are capable of being inferred and are inferred from circumstances, it would be a merely arbitrary limitation of legitimate inference to exempt this one subject from its operation.

Mr. *Campbell's* conclusion that the Respondent was the son of the late *Vizier* seems to their Lordships a just inference from the facts, nor does it seem to be at variance with the opinion of Mr. *Fraser*. Mr. *Campbell* treats this as the only question of fact in the case. But the issues distinguish properly between sonship and legitimate birth. Mr. *Fraser* keeps that distinction clearly before him in his judgment. Mr. *Campbell*, indeed, does not appear to

have lost sight of it, but to have considered that he was entitled to presume the Respondent's legitimacy, if cohabitation of his parents, and his birth from them at any time, whether before or after the marriage, were established as facts.

Mr. *Campbell* does not question, in his judgment, the correctness of the opinion expressed by Mr. *Fraser*, that pregnancy commenced during the service. At that time cohabitation, in the sense of permanent intercourse such as takes place ordinarily between man and wife, is not proved to have existed between the late *Vizier* and the mother of the Respondent. The evidence forbids the presumption that that kind of cohabitation commenced with her service, for a change in the treatment of her ensues when she is taken behind the *Purdah*, and the antecedent relation, according to the evidence, was that of ordinary servitude. If pregnancy occurred, as Mr. *Fraser* is of opinion that it did, during that service, and when she was in the habit of going from the house freely into the *Bazaar*, sexual intercourse then in that state between her and her Master would not have the character of cohabitation of a permanent nature, such as under this head of law distinguishes concubinage from casual intercourse. If the subsequent marriage were adjudged to have relation back, by presumption of law, to the time of impregnation, then such a *præsumptio juris* would destroy altogether the difference between a law which admits to inheritance and a law which excludes from inheritance an antenuptial child. As a presumption of fact such a presumption is admissible, but then it must be subject to the application of the ordinary principles of evidence.

A subsequent marriage, so far from furnishing, as

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

1866.
 ASHRUFOOD
 DOWLAH
 AHMED
 HOSSEIN
 KHAN
 BAHADOOR
 v.
 HYDER
 HOSSEIN
 KHAN.

Mr. *Campbell* supposes, a ground for presuming a prior marriage, *primâ facie*, at least, excludes that presumption. Therefore, no ground exists for presuming a marriage antecedent to the *Moottah* marriage which at some period or other was established between the *Vizier* and the mother of the Defendant. Laying, then, this presumption aside, it appears to have been found in the Court below, on evidence which justified that finding, that pregnancy commenced during the time when the mother of the Respondent was in service, and before she had the acknowledged *status* of a *Moottah* wife. There was a marriage, but when it does not appear. It does not appear when the intercourse began which led to the birth, nor what was the nature of it, whether casual or of a more permanent character. It is obvious that the pregnancy might induce the desire to give the woman the reparation of marriage. No difficulty is suggested about rendering these dates certain, which are now left utterly uncertain.

The treatment of the Respondent by the *Vizier* appears for many years to have been that of a son by its father: this, however, is correctly treated by Mr. *Fraser* as inconclusive in itself, since a son conceived before marriage, and whom his father desired to recognize at some time as a legitimate son, would receive similar treatment. The treatment itself, therefore, does not suffice to dispel the darkness in which this case is left. The *onus* of proof lay on the Respondent, on the pleadings in this cause, to prove his mother's marriage, and his own legitimacy as a child of that marriage. There has been no continuing treatment up to the time of the father's death; there has, on the contrary, been an absolute denial of pa-

ternity by the reputed father; there is no proof of any acknowledgment, but there is proof of treatment strong enough to prove legitimacy in an ordinary case, but of treatment not inconsistent with the *status* of a son conceived before marriage. It is shown that the Respondent did not receive all the honours which his brother received. This circumstance is much pressed against him by the Appellants.

It may be, however, that the inferiority of his mother's condition, or his own later birth, caused the difference; or, on the other hand, the father may have postponed a legitimating acknowledgment, being as yet undecided as to his future treatment of him, and he may have waited to see how the youth conducted himself at puberty. The circumstance of some inferiority of condition having been continued down to the time of final rupture, to some extent supports the case of the Appellants, that the Respondent was not legitimate. Their Lordships are, therefore, of opinion, that the decision of the Commissioner is founded upon presumptions not warranted by the facts of the case, and in some degree upon a misconception of the authorities, and ought not to be allowed to stand. They will, therefore, humbly advise Her Majesty to reverse that decision, and to affirm the judgment of the Court of First Instance. Considering, however, that the uncertainty as to the *status* of the Respondent has been mainly caused by the acts of the deceased *Vizier*, the residue of whose estate will, in consequence of this decision, fall to the Appellants, their Lordships are not disposed to subject the Respondent to the costs in the Commissioner's Court, or to those of this appeal.

1866.

ASHRUFOOD
DOWLAH
AHMED
HOSSEIN
KHAN
BAHADOOR
v.
HYDER
HOSSEIN
KHAN.

SHAH KOONDUN LALL and SHAH }
 PHOONDUN LALL ... } *Appellants,*

AND

RAJAH AMEER HUSSUN KHAN, }
 Minor, RAMDUTTA MULL, }
 Curator, and the DEPUTY COM- } *Respondents.**
 MISSIONER OF SEETAPORE ... }

On appeal from the Court of the Judicial Committee of the Province of Oude.

13th Dec.,
1866.

THE facts of the case are fully stated in the judgment.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellants, and

Mr. *Forsyth*, Q.C., and Mr. *Maule*, Q.C., for the Deputy-Commissioner of *Seetapore*, one of the Respondents.

1st Feb.,
1866.

The case after argument stood over for consideration.

Judgment was now pronounced by

The Right Hon. Sir JAMES W. COLVILE.

The Appellants are *Shroffs* and money lenders, carrying on business at *Muttra*. The Respondents

* Present :—Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

In a suit to recover the amount of principal and interest due upon two several Bonds, one of which alone was forthcoming, the other being referred to and vouched by a note of hand

of the Obligor, the issues settled and recorded by the Court below for trial were, first, whether the first Bond was the deed of the deceased Obligor, and, secondly, whether the note of hand was under the seal of the Obligor, and if so, whether it was a valid acknowledgment of the debt

are the infant son and heir of the late *Nawab Ali Khan*, who was *Talookdar* of *Mahmudabad*, in the Province of *Oude*; the native Manager or Curator appointed by the Court of Wards, who, during the minority of the *Talookdar*, has the custody and management of his estate; and the Deputy Commissioner of *Seetapore*, who represents and exercises the functions of the Court of Wards in that District. The deceased *Nawab* died largely indebted to the Appellants; and the question on this appeal is, whether the decree which has been made in their favour by the Civil Court of *Lucknow*, and has been confirmed by the Judicial Commissioner of *Oude*, has awarded to them all that they had a right to claim.

1866.
 SHAH
 KOONDUN
 LALL
 v.
 RAJAH
 AMEER
 HUSSUN
 KHAN.

The latest transaction between the Appellants and the *Nawab*, of which there is any evidence, was in *May*, 1856; when, as they allege, an account was settled between them and their debtor, and the securities on which they sue were taken from the foot of it. One of the Bonds is not forthcoming, but by the other the sum thereby secured, which was by far the larger portion of the debt, was made payable by instalments, of which the first fell due about *September*, 1857. At that time British rule had been inter-

claimed on the second Bond, and up to what time and at what rate interest was due. The Court below, notwithstanding that the first Bond actually proved, purported to have been given on an account settled, allowed evidence of the accounts and dealings between the Obligor and Obligees previous to the execution of both Bonds, and, after having referred the same to an Accountant, decreed the Plaintiffs entitled to a less sum than sued for, with interest upon the account thus taken:—Held on appeal by the Judicial Committee that the Courts below had miscarried, first, in allowing the opening of and founding the decrees upon settled accounts, the only question upon the issues recorded for their judgment being the validity of both Bonds, of which they were satisfied, and secondly, that from the frame of the issues neither the Obligees nor their representatives were bound to prove the consideration for the Bonds, but were entitled to recover the whole principal and interest due thereon, which was decreed, and the decree of the Court below amended to that effect.

1866.
 SHAH
 KOONDUN
 LALL
 v.
 RAJAH
 AMEER
 HUSSUN
 KHAN.

rupted, and all civil administration suspended, by the mutiny; and that state of things continued until after the *Nawab's* death in 1858. In *April*, 1859, when order had been restored, and the Court of Wards had assumed the management of the estate, the Appellants claimed the sum of Rs. 35,239 as then due to them for principal and interest. The suit, however, out of which this appeal has arisen was not actually commenced until *January*, 1862. Certain proceedings were had during the intermediate period. But all these are beside the present question. They may have been material in the Court below in order to show the *bonâ fides* of the demand, to account for the delay in prosecuting it, and to meet the point, which was at one time raised, that the suit had not been commenced within the period of limitation of suits. This last objection has, however, been abandoned; and it must be taken to be a fact established, if not admitted, that something is recoverable upon the principal security on which the suit has been brought.

The particulars of the Appellants' demand were annexed to the plaint. They claimed as then due to them the principal sum of Rs. 22,188, of which Rs. 20,488 were stated to be due on a Bond of a date corresponding with the 15th of *May*, 1856, and Rs. 1,700, on another Bond of the same date. They further claimed a like sum of Rs. 22,188, as due for interest on the principal debt; a larger sum being, as they alleged, in fact so due, but the practice of the Courts of *India* forbidding the recovery under the head of interest of any amount in excess of the principal. And they also claimed a sum of Rs. 5,711. 5a. 3p., alleged to be the balance due in respect of an allowance agreed to be paid to the *Karindahs* or!

Agents of the Appellants. They gave credit for Rs. 100, admitted to have been received some time in the year 1857, and thus reduced the balance claimed to Rs. 49,987. 5a. 3p.

The Appellants filed in Court the Bond for the Rs. 20,488, which was marked Exhibit *A*. They did not produce the Bond for the Rs. 1,700, which they said had been lost, but they filed a note of hand or letter of the same date, Exhibit *B*, which is in these words:—
 “My dear *Shah Koondun Lall*,—As two Bonds have been executed through your Agents, viz., one for Rs. 20,488, and the other for Rs. 1,700, you may rest assured that payment will be made on account of the rights of your Agents at the rate of 8a. *per* Rs. 100, *per* month.” They seem to have relied on this document both as corroborative evidence of the execution of the second Bond, and as a voucher in support of the claim for the allowance to the Agents.

The issues settled in the cause, on which the parties went to trial, were:—First, is *A* the deed of *Nawab Ali Khan* deceased? Secondly, how much was repaid? Thirdly, is *B* under the seal of the deceased; and if so, is it a valid acknowledgment of debt, especially with reference to an alleged Bond for Rs. 1,700? Fourthly, up to what date, and at what rate, is interest claimable?

The decree which is under appeal reduced the principal sum recoverable by the Appellants in this suit to Rs. 18,145, and allowed interest on that sum at the rate of only 12 *per centum per annum*, from the 15th of *May*, 1856, to the date of suit, deducting from that period the ten months during the time of the rebellion. It rejected altogether the claim for the allowance to the Agents.

1866.
 SHAH
 KOONDUN
 LALL
 v.
 RAJAH
 AMEER
 HUSSUN
 KHAN.

1866.
SHAH
KOONDUN
LALL
v.
RAJAH
AMEER
HUSSUN
KHAN.

Their Lordships will consider the propriety of this decree; first, with reference to the principal money claimed under the Bonds; secondly, with reference to the interest; and lastly, with reference to the Agents' allowance.

It is obvious that as regards the Rs. 20,488, claimed to be due upon *A*, the only issue before the Court was, whether that document had been duly executed by the deceased. The third issue, as their Lordships understand it, involves the questions, whether *B* was under the seal of the deceased; and, if so, whether it can be taken to establish that he had executed the second Bond for Rs. 1,700, and to supply the want of that missing instrument. Upon these issues the Appellants were not bound to prove the consideration for the Bonds. But, inasmuch as no Court of Justice would in the circumstances have accepted the mere proof that the seals on *A* and *B* were true impressions of the deceased *Nawab's* seal, as sufficient proof of the due execution by him of either Bond, it became necessary to go fully into the history of the transaction of the 15th of *May*, 1856. Accordingly evidence was given to show that on that day there was a settlement of accounts between the *Nawab* and the servants of the Appellants who had come over to *Mahmudabad* to "dun" him for what was due from him to the Appellants' firm; that the result of that settlement was to strike a balance of Rs. 22,188, as the amount then due for principal and interest; and to agree that, in consideration of the forbearance by which the larger portion of this sum was made payable by instalments, the interest then due should be turned into principal; and further, that the two Bonds were executed on the footing of that

settled account, the paper *B* being also sealed at that time. This is the general effect of the evidence, which, notwithstanding certain discrepancies, and some confusion touching the Exhibit *C*, their Lordships are disposed to accept as substantially true, particularly as there is nothing to set against it, and it is confirmed by *Seetaram*, the witness examined at the instance of the Defendants.

If the case rested there, it would be difficult to see upon what ground the Respondents could resist a decree for the full amount secured by the Bonds, or at least that secured by Bond *A*. It appears, however, that the Appellants produced the accounts which resulted in the balance of Rs. 22,188. The record does not show why this was done. There is no Order of the Court requiring their production. It is possible that the production may have been voluntary, and that these accounts were put in in order to corroborate the evidence of *Datta Mull* as to the Bond for Rs. 1,700, which they do, as appears by the entry in the record. All that is clear on the record is, that the accounts were brought in between the 22nd of *July* and the 20th of *August*; that the Defendants (the Respondents) took no objections to them, except that "the interest was inserted in a single lump, and not in separate items, after two years' running accounts; so that it was impossible, without calculating interest throughout, to tell on what principle it was done." In consequence of this objection, the Judge referred the accounts first to the native Secretary of the Chamber of Commerce at *Lucknow*, and afterwards to other *Mahajuns* and Experts; and the final result of their investigation was, that, by recasting the account of interest, they reduced that

1866.

SHAH
KOONDUN
LALL

v.
RAJAH
AMEER
HUSSUN
KHAN.

1866.
 SHAH
 KOONDUN
 LALL
 v.
 RAJAH
 AMEER
 HUSSUN
 KHAN.

portion of the balance due in *May*, 1856, which consisted of interest and expenses, from Rs. 13,580. 6a. 9p. to Rs. 9,547. 8a. 9p., making the whole amount due at that date Rs. 18,145. 2a., instead of Rs. 22,188.

Their Lordships do not attempt to enter into the question whether the principle upon which the Appellants kept their account, or that upon which the account has been recast by the Experts, is the correct one; because they are of opinion that no case was made for reopening the account which was settled on the 15th of *May*, 1856. The evidence of *Seetaram*, the witness for the Respondents, shows that the *Nawab* examined the accounts; that he objected to the interest; but that he nevertheless finally submitted to the account rendered, accepted the balance shown as the sum due, and, in consideration of his creditors' forbearance, executed the Bonds by which payment of that balance was secured. He was no doubt very much at the mercy of his Creditors; his case was the ordinary one of a needy landholder purchasing the forbearance of those who had ministered to his necessities by submitting to very usurious terms. But, with his eyes open, he entered into a contract which is not forbidden by any law. No fraud, in the proper sense of the word, has been established; and their Lordships cannot agree with the Judicial Commissioner in thinking that, upon the facts proved, the *Nawab* would in his lifetime have been entitled to reopen an account which he had advisedly settled. And if this could not have been done by him in his lifetime, it cannot now be done by his representatives. Their Lordships, therefore, conceiving that there is sufficient proof that the missing Bond for Rs. 1,700, was duly executed as well as *A*, and that the two were

given to secure the balance of Rs. 22,188, must hold that the Appellants have made out their right to recover that principal sum in this suit.

Their Lordships are unable to see upon what ground the Courts below have reduced the rate of interest on the sum which they awarded as due on the 15th of *May*, 1855, below the contract rate. Their course would perhaps be intelligible if they had set aside the securities altogether as fraudulent, and had treated the sums awarded as due on open account; no rate of interest being fixed by either positive stipulation or the course of dealing between the parties. The facts, however, would not support such a view of the case; nor does Mr. *Fraser*, notwithstanding some loose and inaccurate expressions in his judgment, appear to have entertained it. The intention of the decree, as explained by his Judicial Commissioner, was simply to correct the account, and to allow *A* to stand as a security for the reduced balance. And if *A* were to stand as such security, the contract rate of interest would remain. It must *à fortiori* remain, if, as their Lordships think, there is no ground for re-opening the accounts, and reforming the contract of the deceased *Nawab*.

Some difficulty might arise in respect of interest from the absence of the missing Bond, and the imperfection of the evidence as to its details, if the whole amount of interest that has accrued was demandable in this suit. But inasmuch as the Appellants have been obliged to limit their demand for interest to a sum equal to the principal, and the interest due at the contract rate on Bond *A* alone considerably exceeds the sum of Rs. 22,188, the difficulty suggested does not arise in the present case. Again,

1866.

SHAH
KOONDUN
LALL

7.
RAJAH
AMEER
HUSSUN
KHAN.

1866.
 SHAH
 KOONDUN
 LALL
 v.
 RAJAH
 AMEER
 HUSSUN
 KHAN.

it is not easy to see upon what principle of law, equity, or sound policy the period when the rebellion took place should be excluded from the time for which interest is computed. It is unnecessary, however, for their Lordships to amend the decree in this respect; because, even if that deduction be allowed, the interest which has accrued would still be in excess of the principal.

Their Lordships, then, are of opinion that the Appellants have established their right to recover the whole of both the principal money and interest claimed by them to be due on the Bonds.

But the claim of the further sum of Rs. 5,711. 5a. 3p. in respect of "allowance due to the *Karindahs* and Agents," under Exhibit *B*, was, in their Lordships' judgment, properly rejected by the Courts below. Whether that allowance was a contrivance for adding another half *per cent.* to the usurious interest already secured by the Bonds, or whether it was what it purports to be, a gratuity to the Appellants' servants, their Lordships do not pretend to say. It seems, in any point of view, to be something *dehors* the contract; and the evidence fails to show that there was any consideration to support the assurance or promise to make this payment, which is contained in Exhibit *B*. If this item be struck out of the particulars, it will reduce the Appellants' demand to Rs. 44,276, which sum, with interest at the ordinary Court rate from the date of the decree to the date of payment, they are, in their Lordships' judgment, entitled to recover in this suit.

Their Lordships will, therefore, humbly recommend Her Majesty to reverse the Order of the Judicial Commissioner of *Oude* of the 11th of *May*, 1863, and

to declare that the Appellants were entitled to recover in this suit the sum of Rs. 44,276, in lieu of the sum of Rs. 28,645, awarded to them by the decree of the 24th *November*, 1862, and likewise the costs of the proceedings in both the Courts below, and that the cause be remitted to the Civil Court of *Lucknow*, in order that the last-mentioned decree may be amended accordingly.

The Appellants' costs of this appeal must be paid by the Respondents.

1866.
 SHAH
 KOONDUN
 LALL
 v.
 RAJAH
 AMEER
 HUSSUN
 KHAN.

CHARLES SEATON GUTHRIE and }
 SOPHIA his wife ... } *Appellants,*

AND

FREDERICK GEORGE LISTER ... *Respondent.**

On appeal from the High Court of Judicature at Calcutta.

THIS was a suit brought by the Respondent against the Appellants in the Court of the Principal *Sudder Ameen* of the Twenty-four *Pergunnahs*, to recover

17th Nov.,
 1866.

* Present :—Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor :—The Right Hon. Sir Lawrence Peel.

A. advanced to B., his son-in-law, two sums of money for the purpose of trade. These advances were secured by promissory

notes, by which B. agreed to repay the loans in three years, with interest at five per cent. B. paid in his lifetime, and debited himself in his account with interest upon these loans at the rate of eight per cent. There was, however, no fresh agreement as to such increased rate of interest, nor did A. press for it. At B.'s death A. claimed against his estate the principal sum due with eight per cent. interest. Held

1866.
 GUTHRIE
 v.
 LISTER.

the sum of Rs. 26,640. 10a. 10p., alleged by him to be due by the Appellant, *Sophia Guthrie*, formerly *Sophia Inglis*, the Executrix of her husband, *Henry Inglis*, to the Respondent, and claimed by him to be the balance of an account up to the 15th of *August*, 1863, for moneys advanced and lent by him to *Inglis* in his lifetime, and the Respondent claimed interest on that sum at the rate of eight *per cent.*, being, as he contended, the rate of interest agreed to be paid by *Inglis* to the Respondent.

The Respondent was a Major-General in the Indian army, and the Appellant, *Sophia Guthrie*, was his daughter.

Inglis at one time was assistant political Agent to the Respondent, who acted as the Governor-General's Agent in the *Kossya Hills*, in *Bengal*. *Inglis* carried on business as a Merchant in *Bengal*, and certain pecuniary transactions existed between him and his father-in-law, the Respondent. On the 18th of *May*, 1850, the Respondent advanced to *Inglis* the sum of Rs. 41,900, and *Inglis* gave his promissory note for that amount, agreeing to redeem within three years, and to pay five *per cent.* interest. On the 31st of *December*, 1850, the Respondent made a further advance to him of the sum of Rs. 19,500, upon the same terms and conditions.

Inglis died in 1860, and by his Will left his widow, the Appellant, *Sophia*, afterwards the wife of *Charles Seaton Guthrie*, his sole Executrix. On examining

(reversing the decree of the High Court at *Calcutta*), that although *B.* had voluntarily debited himself in his accounts with interest at the rate of eight *per cent.*, yet the legal relation created by the promissory notes was a contract to pay five *per cent.* on the money borrowed, and the voluntary payment of eight *per cent.* being without consideration, did not constitute a new contract so as to bind his estate with the payment of eight *per cent.*

the deceased's papers, it was found that he had debited himself with interest at eight *per cent.* on the above loans.

On the 14th of *May*, 1861, the Respondent wrote to his daughter, the Appellant, *Sophia Guthrie*, a letter, containing the following passages:—"Poor *Harry's* last account current, which you gave me in *Berkeley Square*, is made up to the 30th *April*, 1859, and exhibits a balance in my favour of one lac and fifty rupees three annas and four pice. Since that date I have received nothing whatever, and whether anything has been paid in on my account I have no knowledge. With respect to the interest due on the above sum, you can give what you please. Avarice is not one of my sins; if it had, I should have invested my capital in Bank, Coal, and Steam Company's shares, by which it would have increased to half as much again, besides being in receipt of much larger interest than what I was receiving. At the time *Harry* asked me for the loan of the money, he offered to mortgage his property to me, but I said it was unnecessary, considering the relation we stood towards each other. I also told him I did not require him to allow me larger interest than what I was getting from the Government: he replied he could well afford to give me eight *per cent.*, as he was making more than treble that sum by my money; that being the case, I made no further objection, beyond saying that he could do as he pleased. *Harry*, during his illness, once told me that he had eleven lacs of rupees in Company's paper, but where it was lodged, or with whom, he did not say; and I being averse on all occasions of prying into other people's affairs, did not ask him; he also told me that he had

1866.
GUTHRIE
v.
LISTER.

1866.
 GUTHRIE
 v.
 LISTER.

left my money in his business, and on doing so asked if I then wanted money. I said, 'No;' I had sufficient to go on with. This is all that ever passed between me and him on the subject of his money affairs."

It appeared that the Appellant, *Sophia Guthrie*, did not then raise any objection to the payment of eight *per cent.* interest, and subsequently paid the Respondent on account, Rs. 100,000. An estrangement with the Respondent afterwards took place, and the Appellant, believing that she had paid all that was legally due, refused to pay any more.

Sophia Inglis having married the Appellant, *Charles Seaton Guthrie*, the Respondent brought a suit in the Court of the Principal *Sudder Ameen* for the Twenty-four *Pergunnahs*, against the Appellants to recover the sum of Rs. 26,640. 10a. 10p. for money lent and interest at eight *per cent.* due from the Appellant, *Sophia Guthrie*, as Executrix of her late husband *Henry Inglis'* Will, on the balance of the before-mentioned promissory notes. The defence set up was, that *Inglis*, being a wealthy man, had voluntarily debited himself with eight *per cent.* interest in the Respondent's favour, but that he was not liable under the promissory notes to pay more than five *per cent.*, and had never entered into any contract to pay a larger interest. The letter of the 14th of *May*, 1861, was put in evidence.

By the decree of the Principal *Sudder Ameen* (*Grish Chunder Ghose*), dated the 3rd of *March*, 1864, the *Ameen* expressed his opinion that five *per cent.* was only due, and dismissed the Respondent's suit with costs. On a regular appeal therefrom to the High Court of Judicature at *Calcutta*, composed

of the Hon. *C. B. Trevor* and the Hon. *G. Campbell*, Judges, on the 17th of *August*, 1864, that Court reversed the decree of the Principal *Sudder Ameen*, and decreed the claim of the Respondent for Rs. 26,640 10a. 10p. with interest thereon at the rate of eight *per cent. per annum*, from the 15th of *August*, 1863, to the date of realization; and also ordered the Appellants to pay the Respondent the sum of Rs. 1,326. 6a. 1p. for costs in the High Court, with interest thereon at the rate of twelve *per cent. per annum*, from the date of the decree to the date of realization, together with costs in the Lower Court, at the same rate of interest.

The appeal was from this decree.

Sir *R. Palmer*, Q.C., and Mr. *Newmarch*, for the Appellants.

It was not established in evidence, that there was any contract between *Inglis* and the Respondent legally binding on the former for payment of interest at a higher rate than five *per cent. per annum*. The mere fact that *Inglis* voluntarily debited himself with eight *per cent.* formed no new contract. It was without consideration and could not bind his estate. Neither was there any agreement for the payment of interest upon interest with annual rests. The account directed by the High Court was wrong in principle as between the Respondent and *Sophia Guthrie*, the Executrix of her deceased husband, *Inglis*. It ought to have been made up with interest at five *per cent.* only, and without annual rests. According to that calculation the payments to the Respondent left a balance in the Appellant, *Sophia Guthrie's*, favour.

1866.
GUTHRIE
v.
LISTER.

1866.
 GUTHRIE
 v.
 LISTER.

The Attorney-General (Sir *John Rolt*, Q.C.,) and Mr. *Rodwell*, for the Respondent.

It is clear that *Inglis* agreed to pay interest at eight *per cent. per annum* on the amount of the loans which were made him by the Respondent. He debited himself in his account with the Respondent with interest at that rate. It was a new contract in substitution of the original one, and was acted upon by him up to his death and binds his estate. The account based upon this agreement was properly ordered to be taken.

At the conclusion of the arguments their Lordships' judgment was delivered by

The Right Hon. Lord WESTBURY :—

This is a suit of a painful nature, which has arisen between a daughter and her father, touching the rate of interest payable upon a loan made by the father to her deceased husband.

It appears that Mr. *Henry Inglis*, the son-in-law of General *Lister*, was engaged in trade; that the trade was lucrative; and that he applied to General *Lister* to advance him money, to be employed by him in that trade. General *Lister* assented, and lent to his son-in-law, on two several occasions in the same year, two sums of money, one amounting to Rs. 41,900, the other amounting to Rs. 19,500. On the occasion of these advances two promissory notes were given by his son-in-law to General *Lister*, and in both those notes (because, although one only is produced, it has been admitted at the Bar that there was another, and that the other must be taken to have been of the

same tenor with that which is produced), there is a promise by the borrower, Mr. *Inglis*, to repay the money borrowed with interest at five *per cent.* at the expiration of three years. The contention now on the part of the General, the lender of the money, is, that he is entitled to interest at the rate of eight *per cent.*; that his interest is not to be limited to five *per cent.*, which is the prescribed rate of interest on the promissory notes. He might maintain that contention by proving either that at the end of the three years, the time for the repayment of the money, he forebore to press for the money, in consideration of an augmented rate of interest, or he might maintain that the contract, of the terms of which the notes are evidence, was superseded by a new contract, which allowed the money to remain for a longer period of time than three years, at an augmented rate of interest. But unless some such case can be proved, a claim of interest at eight *per cent.*, founded upon a bare promise of the debtor to pay eight *per cent.*, or upon the fact that the debtor has in account voluntarily debited himself with eight *per cent.* in lieu of five *per cent.*, could not be maintained in law for want of consideration, amounting merely to a *nudum pactum*.

It is satisfactory to find that the history of the introduction of the eight *per cent.* into the dealings between the parties is very clearly given by General *Lister* himself; and it is a history which is very creditable to his son-in-law, Mr. *Inglis*, but which is inconsistent with the General's founding upon the circumstances any legal claim. We do not refer to the allegations made in the plaint,—we prefer to take the letter of General *Lister* addressed to his daughter after the death of her husband, in which he gives her

1866.

GUTHRIE

v.

LISTER.

1866.
GUTHRIE
v.
LISTER.

a narrative of the transaction between himself and his son-in-law ; and upon an accurate examination of the contents of that letter, it is clear that the General distinctly states there was but one contract on the subject of interest, which he made with his son-in-law. He states the stipulation was that the legal interest, *i.e.* the legally demandable rate of interest, should be five *per cent.*, but that on the occasion of the loan being made, the son-in-law, of his own accord, said, he would pay eight *per cent.* interest, because he was able to make more than three times that rate by the employment of the money in trade.

It is plain that the words in which this promise was made were not intended to supersede the written engagement. Independently of this, we find the General giving a striking narrative of what occurred between himself and his son-in-law subsequently, some time after the notes had been made, when the son-in-law rendered a written account, in which he had charged himself with eight *per cent.* The General's words amount to this:—I pointed out to Mr. *Inglis* that he was charging himself with eight *per cent.* interest, whereas I was entitled only to five *per cent.*; but the son-in-law said, it is all right, I can make more than three times that amount by the use of your money, therefore, I desire to pay you eight *per cent.* That conversation, again, is a clear acknowledgment on the part of the General that he regarded himself as the legal creditor of his son-in-law for only five *per cent.* It is in perfect harmony with the account given in the letter that the engagement originally was for five *per cent.*, but that the son-in-law said, He could well afford to pay more; and the General answered, You can do as you please

about it. It was left, therefore, to the *arbitrium* of the son-in-law, if he chose to pay eight *per cent.*, to pay that amount; but the legal relation which was created, was an engagement to pay five *per cent.* only. What was done subsequently is not inconsistent with that. We have the fact that, subsequently to the date of the promissory note, on several occasions the son-in-law rendered to his father-in-law accounts current, in which he debited himself with eight *per cent.* instead of five *per cent.*, and that he continued that practice down almost to his death; for in one of his repositories after his death his widow found three accounts or written papers, in which also he had debited himself with eight *per cent.* If there had been no written promissory note, or if there had been no history given by the creditor making the claim of the origin of the introduction of the eight *per cent.*, the accounts so made out by the debtor might be a legal ground for presuming that the original contract had been to pay eight *per cent.*, or that there had been a new contract to pay that rate of interest. They cannot, however, be used as evidence that the original contract contained in the promissory notes was done away with and a new contract substituted, for the reason we have already given, viz., that the General admits that when he saw the first account with interest at eight *per cent.*, he treated it as a thing to which he was not entitled. Clearly, therefore, there was no contract entitling him to eight *per cent.* existing at that time; and with reference to the subsequent accounts, with perfect notice of those accounts, because he had them in his possession, the General writes to his daughter the letter to which we have

1866.

GUTHRIE
v.
LISTER.

1866.
 GUTHRIE
 v.
 LISTER.

referred, explaining how it had arisen, giving, as we have already observed, a history of the introduction of the eight *per cent.*, that it was a voluntary offer by his son-in-law, and that the General did not fasten it upon him and make it part of the contract, but said to his son-in-law, "You shall be at liberty to do as you please about it."

The result of the whole, therefore, seems to be plainly this, that so far as the legal right is concerned, there is but one contract existing for valuable consideration and capable of being enforced, viz., the contract made at the time of the loan, in conformity with the written obligation for the loan contained in the promissory notes; that all departures from that in respect of interest are departures which have been made from mere goodwill and sense of duty on the part of the son-in-law, who is the debtor, but not as being the result of any legal contract or obligation between him and his father-in-law.

There is no trace that the father-in-law ever treated the matter, up to the time of making the demand, as one which entitled him as a matter of right to interest at eight *per cent.*; he always treats it as a matter of bounty and favour on the part of his son-in-law; and he tells his daughter he left his son-in-law at liberty to do as he pleased about it.

We regret that the demand has ever been made. It appears that when the interest is reduced to the legal rate, the sum paid by the Appellant, *Sophia Guthrie*, was more than would satisfy the whole demand of the General according to his just right, and the action, therefore, was brought when there was nothing due on the part of that Appellant. The consequence

must be that the decree of the Court below must be reversed, and the plaint dismissed, and the costs of the proceedings below and of this appeal must be borne by the Respondent.

We will make our report and humbly advise Her Majesty accordingly.

1866.
GUTHRIE
".
LISTER.

MUSSUMAT THAKOOR DEYHEE ... *Appellant,*

AND

RAI BALUK RAM and others ... *Respondents.**

*On appeal from the Sudder Dewanny Adawlut,
North-West Provinces, Agra.*

THE appeal in this case raised two questions; first, whether by the Hindoo law received in the *Benares* or the Western schools, which governed the rights of

11th, 12th, &
13th Dec.,
1866.

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

By the
Hindoo law,
as laid down
in the *Benares*
or Western
schools, al-
though a
widow may
have power of
disposing of

Assessor :—The Right Hon. Sir Lawrence Peel.

movable property inherited from her husband, which she has not under the law of *Bengal*, yet she is by both laws restricted from alienating any immovable property, which she has so inherited; and on her death the immovable property, and the movable, if she has not otherwise disposed of it, will pass to the next heirs of her deceased husband. There is no distinction with respect to such alienation between ancestral and acquired property.

The devolution of *Stridhun*, or wife's peculiar property, from a childless widow, is regulated by the nature of her marriage. If her marriage was according to one of the four approved forms, at her death her husband's collateral heirs succeed to it.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

the parties, *Choteh Bebee*, a childless Hindoo widow, had power to alienate any portion of the property of *Ramjee*, her deceased husband, which consisted of ancestral and self-acquired property; and secondly, whether a registered deed of gift of such property, alleged to have been executed by *Choteh Bebee*, in the Appellant's favour, was valid. The Respondents, who claimed to be heirs of *Ramjee*, denied his widow's power to alienate, as well as the execution of the deed, and insisted that it was a forgery and had been collusively registered.

The decree of the *Sudder Dewanny Adawlut* appealed from, declared that the Respondents were the heirs-at-law of *Ramjee*, and entitled, and that the deed of gift alleged to have been executed by *Choteh Bebee*, was a forgery, and her person simulated before the Registrar of deeds for the purpose of registration.

The facts were these :—

Rai Suhuj Ram, the common ancestor of the Respondents and *Ramjee*, died, leaving considerable real and personal property, consisting of *Talooqua Rughoonathpoor*, situate in *Pergunnah, Bissarah*, in the District of *Tirhoot*, which he had acquired by purchase. The villages of *Beerapoor, Buhore* and *Sooghurgunje*, two of the villages, formed integral portions of the *Talooqua*. He left five sons, *Kirpa Ram, Sheo Ram, Moonshi Jye Ram, Rai Benee Ram*, and *Madho Ram*, all since deceased, him surviving, his joint heirs, constituting an undivided

A deed of gift of immovable and movable estate, alleged to have been executed by a Hindoo widow, which was registered, set aside, as, without deciding that there had been a conspiracy, perjury, and forgery in respect to such deed on the part of the grantee and others, yet that the suspicious circumstances attending its alleged execution and registration had not been removed by sufficient proof to support the affirmative issue on the grantee, and to establish it as a genuine instrument.

Hindoo family, who effected a mutation of names in the Books of the Collector. The family property was subsequently added to by a purchase out of their joint funds of a moiety of three villages, called respectively *Puchowna* (and sometimes *Bichowna* and *Butchna*), *Suksorah*, and *Kishenpore*, all situate in the District of *Behar*. The villages of *Urouj* or *Urrujpoor*, and *Tirhur*, situate in the District of *Shahabad*, were also acquired by the joint family under a grant from the *Maharajah* of *Bohjepoor* in *Mokurrery* tenure. The grandson of *Suhuj Ram*, *Unund Ram*, died leaving three sons, *Fankee Ram*, since deceased, the Respondent, *Toolsee Ram*, and *Salik Ram* (also since deceased without issue). *Ramjee* died in the year 1824, intestate and without issue, leaving *Luchmund Sing*, since deceased, only son of *Fye Ram*, *Salig Ram*, since deceased, *Fankee Ram* also since deceased, the father of the Respondents, *Bheerbhan Sing*, *Munnee Ram*, and *Dhunnee Ram*, and of *Motee Ram*, and also leaving the other Respondents *Rai Baluk Ram* and *Toolsee Ram*, and as members with him of a joint and undivided Hindoo family, entitled as heirs to his undivided share in the ancestral and other property. *Ramjee* left *Choteh Bebee*, his widow, him surviving. The above members of the family participated with the heirs in food, weddings, obsequies, and in the management of the property, and this state of affairs continued up to the date of the departure of *Choteh Bebee* on a pilgrimage to *Juggernaut*.

In addition to the other joint family property, there was purchased out of the joint family funds certain immovable property in the district of *Benares*, which was registered in the names of *Choteh Bebee* and

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

1866.
 MUSSUMAT
 THAKOOR
 DEYHEE
 v.
 RAI BALUK
 RAM.

Radha Bebee. This property consisted of the village of *Okenee Byrumari*, a seventh share in village *Dhourkura*, the village of *Tajpoor Puttee*, appertaining to the *Puttee* of *Rughobur Sing*, and the village, *Tajpore Puttee*, appertaining to the *Puttee* of *Bhoop Sing* and *Debeechurn Sing*, all situate in *Pergunnah, Bidhole*, and also certain houses and land situated at *Lultaghat, Lahoree Tolah*, and *Lucksa*.

In the month of *July*, 1858, *Choteh Bebee* went on a pilgrimage to *Juggernaut*, and before leaving delivered over all the immovable and movable property then in her possession to the custody of the Respondent, *Rai Baluk Ram*.

It appeared that *Choteh Bebee* reached *Juggernaut* and was returning homewards when she died on the way. On hearing of *Choteh Bebee's* death, *Rai Baluk Ram*, as the eldest of the above-mentioned heirs, performed her funeral obsequies. Soon after her death proceedings were had before the Magistrate of *Benares* respecting the succession to the estate, founded on a registered deed of gift of the whole estate, alleged to have been executed by *Choteh Bebee* in favour of the Appellant, who also set up a title as *Choteh Bebee's* adopted daughter. *Rai Baluk Ram, Toolsee Ram*, and *Beerbhan Sing*, also claimed to be heirs of *Choteh Bebee*, and urged that *Choteh Bebee*, as a Hindoo widow, was incompetent to alienate the property, that the pretended deed of gift was a forgery, and the alleged adoption false and contrary to usage, she being a female; and that as to the alleged registration of the deed by *Choteh Bebee*, that it was incredible, as she was suffering severely from dysentery and about to die, and could never have appeared in Court, as was alleged, or would

have done so, being a *Purdah Nasheen* (a woman living in seclusion), having Managers and Agents to transact her business, and that, therefore, it was clear that some other woman must have been substituted for *Choteh Bebee* to the Registrar of deeds.

Pending the settlement of these claims, the Court attached the estate, and finally the Judge of the Civil Court of *Benares* rejected the Appellant's claim, referring her to a regular suit.

The suit in which the present appeal arose, was instituted on the 9th of *April*, 1859, in the Court of the Principal *Sudder Ameen* of *Zillah Benares*, by the Respondents against the Appellant. By the plaint, they sought to obtain a decree for possession by right of succession on the death of *Choteh Bebee*, to the villages and shares of villages above-mentioned as being registered in her name, with houses, lands, and buildings at different places in her possession at the time of her death, and other personal property; and further to obtain a decree cancelling the alleged deed of gift which the Appellant had set up as having been executed by *Choteh Bebee*, and stated to bear date the 30th of *August*, 1858; and finally, for a declaration that the alleged claim by right of inheritance and adoption of the Appellant was void. By the plaint it was submitted, that besides the Respondents there were not any other surviving heirs of *Sahu Ram*, the great ancestor; and it charged that since his death all his heirs took and continued in possession of his estate without any division of shares, and by means of the common stock they had purchased additional landed property. It further stated, that the greater part of the estate was purchased by *Benee Ram*, with ancestral and

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

family-acquired funds, and on his death the name of his son, *Ramjee*, was retained, and when he died the names of his mother, *Radha Bebee*, and *Choteh Bebee* were substituted with the consent of the co-parceners, under a special agreement, admitting the heirship of the latter and the want of power in the former to alienate the property as above mentioned, and that during the lifetime of these ladies they participated with the other co-parceners in food, weddings, obsequies, and in the management of the estate, and no disagreement among them; that, on the contrary, the Respondent, *Rai Baluk Ram's* marriage expenses were defrayed by *Choteh Bebee*, and that he and his wife resided in the same house with her, their table expenses being in common, and that on her leaving for *Juggernaut* in *July*, 1858, she delivered over to him, owing to his being the nearest heir and in possession of the ancestral estate, the entire property, goods, and houses, &c., and recommended to him *Ramrook Sing*, her Agent, and that with the exception of that portion of personal property held in safe custody under the Order of the Magistrate, the whole of the property continued in his possession. The plaint then stated the circumstances attending *Choteh Bebee's* death, *en route* from *Juggernaut*, and the alleged fabrication and putting forward the deed of gift by the Appellant, with the aid of her brother, *Balkishen Bunsee*, who it alleged together must have contrived to produce another woman to impersonate *Choteh Bebee* before the Registrar of deeds at *Midnapore*; and it submitted and charged that the adoption of Appellant never took place in fact, and that if it had, it was invaild and inoperative by Hindoo law, that there was no deed or instrument

of adoption in existence, and that if there had been any such adoption there would have been no necessity to fabricate the pretended deed of gift. The plaint further submitted, that even if such deed of gift had been executed by *Choteh Bebee*, which was denied, it was invalid, as by Hindoo law a widow's estate, which she took as heir of her deceased husband, determined on her death, and that, therefore, she could not alienate by gift or otherwise any property beyond her own life.

The Appellant, by her answer, insisted, first, that as the Plaintiffs had from several generations remained separate, they had no right under the Hindoo law to the property in dispute; secondly, that the property was acquired by and held in the exclusive possession of *Rai Benee Ram*, *Ramjee*, and *Choteh Bebee*; thirdly, that *Choteh Bebee*, during the lifetime of *Radha Bebee*, her mother-in-law, adopted her, and while in a sound state of mind bestowed in gift the entire property to her, and put her in possession, in accordance with the deed of gift, dated the 30th of *August*, 1858, duly attested and registered.

The evidence of the Plaintiffs consisted of the depositions of thirteen witnesses, including those of the Respondents, *Rai Baluk Ram* and *Toolsee Ram*, who generally proved that the family was a joint and undivided Hindoo family, and that the property in question was partly ancestral joint property, and partly acquired by purchases out of the joint funds; that a division or partition of the family property had never taken place; and that the Appellant had never been adopted by *Choteh Bebee*.

The Defendant filed the alleged deed of gift, which was written in Bengalee, a language it appeared not

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

1866.

MUSSUMAT
THAKOOR
DEYHEEv.
RAI BALUK
RAM.

understood by *Choteh Bebee*, who read and wrote Hindee only, and the signature on which (in Nagree) bore no resemblance to her signature; and that it appeared on the face of the instrument that the property which it purported to give to the Appellant was not correctly described as regarded its situation, although it was admitted that *Choteh Bebee* managed the property and was an excellent business woman. The alleged deed of adoption of the Appellant was neither produced nor its absence accounted for. The evidence of the three of the attesting witnesses to the alleged deed of gift produced, were *Balkishen*, the brother of the Appellant; *Bunsee*, a servant, who stated that he did not understand Bengalee, that he could neither read nor write, and that *Nathoo*, the third witness, signed for him. *Nathoo* described himself as a Priest in service of *Choteh Bebee* for ten or twelve years, but he did not corroborate the last witness, as he stated that one *Deenbhundoo* signed for those witnesses who could not write; and this witness also, although he stated he had been so long in the service of *Choteh Bebee*, deposed that he did not know what relation the Respondent, *Rai Baluk Ram*, was to her, or if at all related, and that he had never seen him nor heard that *Choteh Bebee's* husband had uncles or nephews. They all admitted *Choteh Bebee* to have been a *Purdah Nasheen* (a female who does not appear in public), and yet stated that she had voluntarily gone before the Registrar at *Midnapore* to acknowledge her alleged signature, and at a time when she was stated by them to have been suffering under dysentery, the illness of which she died, and when, as they admitted, she was in fear of death. The witness, *Balkishen*, further stated,

that he was a witness to the deed of gift, and that *Choteh Bebee* had fallen ill at *Baiturnee* (*en route* from *Juggernaut*), six days' journey from *Midnapore*, and was in the same state when she arrived at *Midnapore*; that she had the same complaint, dysentery, for a long time at *Benares*, but it increased at *Baiturnee*; and that she died thirteen days after the execution of the deed at *Gobind Chuttee*, seven days' journey from *Midnapore*. He admitted that none of the witnesses other than the two last-named knew *Choteh Bebee*, and that only he himself and the two latter witnesses, and *Chowbey*, a sweetmeat seller, but who was not produced, and on inquiry by order of the Court could not be found, had identified the woman who had signed the deed of gift, and also appeared before the Registrar to acknowledge it, as *Choteh Bebee*, deceased. Eight other witnesses were called to speak to the adoption, but none of them were present at such alleged adoption. Although they said they had heard of it, they admitted that they had never known any other instance of the adoption of a female.

The hearing of the suit took place before Mr. *R. H. Smith*, the Principal *Sudder Ameen* of *Benares*, on the 15th of *February*, 1860, and by his judgment of that date, he found and declared the first issue in favour of the Appellant, that the late *Choteh Bebee* was legally competent to make a gift of all the property in question by Hindoo law, as the same, in his opinion, was not joint ancestral property; and he declared that he saw no reason to doubt the authenticity of the deed of gift, as *Choteh Bebee* had personally attended at the Registrar's office to have it registered, and dismissed the suit with costs.

1866,
 MUSSUMAT
 THAKOOR
 DEYHEE
 v.
 RAI BALUK
 RAM.

1866.
 MUSSUMAT
 THAKOOR
 DEYHEE
 v.
 RAI BALUK
 RAM.

The Respondents appealed to the *Sudder Dewanny Adawlut* at *Agra*, urging the following grounds:—First, that the estate was joint ancestral, being acquired by ancestral undivided capital; and second, that the deed of gift set up by the Appellant was a forgery, and was not proved by the evidence; that the witnesses adduced by the latter, among whom one was her own brother, were untrustworthy, had been tutored, and their statements contradictory; and that on the inspection of the deed other circumstances confirming its spuriousness would be apparent.

The Appellant, by her answer to the grounds of appeal, alleged that the property in dispute was not joint and undivided, but that the property was divided after the decease of *Anund Ram*; that as the name of *Ramjee*, son of *Benee Ram*, was registered as proprietor of the village, *Berapoor Sookhurgunge*, and the names of *Jankee Ram*, *Toolsce Ram*, and *Salik Ram*, of the villages, *Rugoonathpoor* and others, she asked if, as alleged by the Respondents, they were in partnership, how came their names to be registered for the several villages and their respective shares assigned to them? The answer then alleged that the property was self-acquired by *Benee Ram*, and concluded by stating that the claim of the Respondents was not established, and, therefore, their objection to the deed of gift was of no avail.

On the 6th of *August*, 1861, the *Sudder Dewanny Court* put the following questions to the Hindoo Law Officer attached to that Court:—

Question 1.—*C.* and *D.* have inherited landed property from a common ancestor, *A.*, and have divided it between them. *C.* dies and leaves a son,

F. D. dies and leaves a son, *G.* *G.* dies leaving no issue, but a widow, *H.* Query: Can the widow *H.* will away by Testament, to relations of her own blood, the share of the ancestral property which belonged to her husband, *G.*? or, after her death, will that share necessarily revert to her husband's cousins?

Answer.—If the share of the ancestral property which the woman's husband held separately by virtue of a partition, and to which she succeeded after his death, consisted of personal property, she could give it away to any one she chose; but, as it consists of real property, she cannot do so under any circumstances; for such (real) property must necessarily remain in the family of the person by whom it was originally acquired. The object in making a division of property is to preserve peace and to prevent disputes, but the parties take division mutually retain their rights in respect of the whole property. Hence *H.* shall, according to *Kattiayun* and others, have a right to enjoy the real property during her life, after which it shall revert to her husband's near of kin, viz., his cousins, &c.

Question 2.—Can the widow *H.* alienate, by sale, gift, or otherwise, during her lifetime, the share of her husband, *G.*?

Answer.—The answer to the first question involves also the answer to the second; *i.e.* *H.* has not the power of alienating the real property by sale, gift, or otherwise, which she would have had in the case of personal property.

Question 3.—If the widow *H.* or her husband *G.* shall, during their lifetime, have acquired any other real property with the proceeds of their share of the

1866.

MUSSUMAT
THAKOOR
DEYHEE

V.
RAI BALUK
RAM.

1866.
 MUSSUMAT
 THAKOOR
 DEYHEE
 v.
 RAI BALUK
 RAM.

ancestral estate, can the widow *H.* alienate the real property so acquired by Will, by sale, by gift, or otherwise, or does it, on her death, revert to her deceased husband's cousins, in common with the other ancestral estate?

Answer.—The real property which *G.* or *H.* acquired during their lifetime with the proceeds of the former's separate share is not hereditary, and the latter (because her husband died without issue) can give it away to any one she likes. Real property cannot be alienated in the event of the person who acquired it having issue of his own.—*Pundit, Hera-*
nund.

It having been discovered in the *Sudder Dewanny Adawlut* that the Appellant had not examined the persons whom she alleged had witnessed or had knowledge of the deed of gift, and who were residing at *Midnapore*, and considering that it was expedient that they should be examined, the Registrar of that Court was ordered to communicate by letter with the Judge of *Midnapore*, and request him to examine on interrogatories, those several witnesses, and to return their depositions to the *Sudder* Court. In obedience, the Judge, *E. Jackson*, Esquire, examined five witnesses, all but *Chowbey*, who could not be found. Their evidence was contradictory and unsatisfactory as to what took place; not one of these witnesses knew *Choteh Bebee*, but could only rely on the three former witnesses' statement as to identity. The Judge returned the depositions to the *Sudder* Court at *Agra*, with an official letter, bearing date the 23rd of *September*, 1861, expressing his opinion of the characters and conduct of two of those witnesses, who were the *Vakeel* and *Mookhtar* employed by *Balkishen*

in preparing the alleged deed and in witnessing it, that they were not worthy of credit.

The hearing of the appeal took place before *M. R. Gubbins* and *James Lean*, Esquires, two of the Judges of the *Sudder Dewanny Adawlut*, on the 16th of *November*, 1861, when they delivered the following judgment:—"Of the pleas adduced in appeal it is only necessary to go into one—viz., the allegation that the deed of gift on which the Defendant (Respondent's) claim is based is a forgery. This, we observe, is a main and most important issue in the case, and towards its thorough investigation and development the attention of the Lower Court should have been principally directed. We consider it to have been an error of judgment in the Principal *Sudder Ameen* that he should have constituted any other issue than this the first issue, and should have devoted the greater part of his judgment to other questions which, in our opinion, do not even require to be examined, when the main plea 'of the Defendant's claim being based upon a forgery' has been properly investigated. That plea the Lower Court rejected briefly at the close of its judgment, upon reasons which we hold to be wholly insufficient. After a full consideration of the circumstances put forth by the Defendant (Respondent) respecting the execution of the *Hibbenamah*, by the deceased *Choteh Bebee* at *Midnapore*, a few days before her death, in favour of her niece, by which deed the large property, real and personal, which she died possessed of would be diverted from the Plaintiffs (Appellants) the rightful heirs-at-law, to the Defendant, who appears to be a childless widow, dependent on her brother, *Balkishen*, nephew of the deceased, who accompanied her upon

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

1866.

MUSSUMAT
THAKOOR
DEYHEE7.
RAI BALUK
RAM.

her pilgrimage to *Juggernaut*, from which she never returned, and who also witnessed the deed of gift; we have no hesitation in rejecting it altogether, as we hold that the Defendant has entirely failed to establish its authenticity. We are of opinion, that there is a strong preponderance of probabilities against the admission of the fact advanced by the Defendant, that *Choteh Bebee* executed this deed in her lifetime and with her own consent. We incline rather to regard the deed to be a fabrication after the death of *Choteh Bebee*. The deceased is shown to have been a good woman of business, transacting her affairs herself, and the business letters which have been put in evidence by the Appellants show not only this, but also that her handwriting was excellent. Now, in the deed in question, the property belonging to the deceased is so incorrectly stated, that even the names of the *Zillahs*, or Districts in which the landed estates lie, are misstated. This could not have been the case had *Choteh Bebee* herself really dictated the instrument. Again, the signature bears no sort of resemblance to the excellent handwriting of the deceased. We think the reason assigned by the Principal *Sudder Ameen* for getting over this objection, viz., that *Choteh Bebee* was 'prostrated by sickness,' is quite insufficient; for the Defendant alleges that *Choteh Bebee* executed the deed at *Midnapore*, where she was able to cook her own food, and afterwards attended in person at the Registrar's office, and attested it. She is there represented to have travelled seven marches beyond *Midnapore*, and to have died thirteen or fourteen days after the execution of the instrument. It certainly must be inferred from these asserted facts, that she

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

ought to have been capable of writing a signature not very different from her ordinary one, at the time when it is pretended that she executed this deed. No witnesses of any real respectability, or on whose evidence reliance can be placed, are found to have attested the deed. It bears the signature of nine witnesses. Of these, three only were acquainted with the deceased so as to be able to speak to her identity. These are *Balkishen* himself, brother of the Defendant (who is evidently the party who will most benefit by the recognition of the deed), and two servants of his, named *Bunsee*, caste *Koonhee*, and *Nathoo*, a Brahmin. Their evidence is open to too much suspicion to carry weight with us. The remaining six are persons of no note at *Midnapore*, and it is not pretended on the part of the defence that any one of them was personally acquainted with the female donor. This radical defect in their testimony is attempted to be supplied by a statement made by *Balkishen* and others, that a certain '*Chowbey*' originally resident of *Muttra*, who then lived at *Midnapore*, had been cognizant of the whole transaction, and had assisted the deceased in procuring the services of the *Vakeel* and *Mookhtar*, who are two of the subscribing witnesses, and the attendance of the four other witnesses. But this *Chowbey* has not been produced; he has not been even named; nor is the Defendant able to indicate him in any such way as to enable us to cause his attendance. Further, on reference to the Judge at *Midnapore*, that Officer, Mr. *E. Jackson*, in his letter No. 130, dated the 23rd of *September* last, makes the following remark in respect to the *Vakeel* and *Mookhtar* alluded to:—'I place little reliance on the good faith of the *Mookhtar* and *Vakeel* who attest the deed,—first, because they had

1866.
 MUSSUMAT
 THAKOOR
 DEYHEE
 v.
 RAI BALUK
 RAM.

the audacity to identify the woman who executed the deed before the Registrar of deeds when they were totally unacquainted with her; and secondly, as to the *Vakeel*, because from my experience in this District of his depositions in other cases, I place little credit in his good faith generally; an opinion which certainly tends still further to diminish the value of the testimony adduced in support of the *Hibbenamah*. We further observe that the only witnesses brought into Court for the defence, out of those whose names are attached to the deed, are *Balkishen* and his two servants. The six others, residents of *Midnapore*, were not examined until a commission issued from this Court. The circumstance that the Defendant took no pains to have her own witnesses examined is obviously a most suspicious one, and ought, in our opinion, to have attracted more notice than it seems to have done from the Principal *Sudder Ameen*, whose acceptance of the deed on the very imperfect evidence tendered for the defence we consider to be a serious error of judgment. For the above and other reasons, which need not be enumerated, we decide to reject altogether the *Hibbenamah* in favour of herself, on which the Defendant's case is built; and accordingly we reverse the decision of the lower Court, and decree for Plaintiffs (Appellants) with all costs."

The present appeal was from this judgment.

The Attorney-General (Sir *John Rolt*, Q.C.), Mr. *Forsyth*, Q.C., and Mr. *A. Bailey*, for the Appellant.

Three questions arise upon this appeal,—first, had *Choleh Bebee*, a childless Hindoo widow, power to alienate the estate of her deceased husband, to which

she succeeded on his death ; secondly, was the deed of gift made by her in the Appellant's favour, a valid instrument ; and thirdly, have the Respondents established their title as the heirs of *Ramjee*.

First, as to *Choteh Bebee's* power of alienation. There were four species of property to which she succeeded on her husband's death—(1) ancestral, which we admit she could not alienate ; (2) the family real estate held by her husband in severance ; (3) the self-acquired property of *Benee Ram* and *Ramjee* ; and (4) that separately acquired by *Choteh Bebee* herself. With respect to the latter three descriptions of property, it was no doubt competent for her, as a Hindoo widow, to alienate by deed of gift. The law which governs the rights of the parties in this case is the *Mitacshara*, which prevails in *Western India*. It was a divided Hindoo family. Although there may be some restraint upon a widow's power of disposition of her deceased husband's estate by the *Daya-bhaga*, regulating succession in *Bengal*—*Sreemutty Soorjeemoney Dossee v. Denobundoo Mulklick* (a)—yet by the *Mitacshara* the widow of a member of a divided family takes the whole estate of her deceased husband, which devolves on her by inheritance absolutely. The *Mitacshara*, chap. ii. sec. i. arts. 6, 18, 30, 39, Translation by *Colebrooke*, p. 336, and ch. ii. sec. 11, on the separate property of women, *Strange* “Hindu Law,” Vol. I. p. 134 (2nd Ed.), alluding to the passages in the *Mitacshara* on the widow's right to inherit, says it is “a right vested in her by marriage, to be perfected on the death of her husband, dying without leaving male issue ;” and in treating of a woman's separate estate, *Sir Thomas Strange*, “Hindu Law,” Vol. I. p. 248 (2nd Ed.)

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

(a) 9 Moore's Ind. App. Cases, 123.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

says : " But, according to the *Mitacshara*, ch. ii. sec. xi. 2, and its followers, property, which the widow may have acquired by inheritance, is transmissible to her own heirs, classing with this school as part of her *Stridhana*." To the same effect it is laid down in *W. H. Macnaghten's* " Princ. of Hindoo Law," Vol. I. p. 40. The Hindoo law officer consulted in this case says she can alienate self-acquired estate (a). The case of *The Collector of Masulipatam v. Cavalry Vencata Narrainapah* (b) is distinguishable from the present case, as it involved a question of escheat of a *Zemin-dary* to Government for want of male heirs. It is apparent that the decree of the *Sudder* Court cannot be sustained. The *Benares* property was purchased by *Choteh Bebee* after her husband's death. It was from the *Stridhana*, or accumulations from her income and savings from her husband's property, and as such entirely at her own disposal.

Secondly, the genuineness of the deed of gift by *Choteh Bebee* to the Appellant, her adopted child and niece, was established by the evidence, and the Respondents failed to prove that it was a forgery. The *Sudder* Court assumes personation of *Choteh Bebee* by a stranger before the Registrar and forgery of the deed of gift. There is no evidence to justify such a conclusion. Lastly, we submit, that the Respondents have not established that they are the heirs of *Ramjee*, as they were bound to do.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Respondents.

The descendants of *Sahuj Ram*, the common ancestor, were members of a joint and undivided

(a) *Ante*, p. 150.

(b) 8 Moore's Ind. App. Cases, 529.

Hindoo family. The *onus* lies on the Appellant to prove the separation of *Bennee Ram*, or of his son, *Ramjee*, from whose childless widow, *Choteh Bebee*, she alone claims title. Part of the property the Appellant claims is admitted to have been ancestral property, descended directly from *Sahuji Ram*; the remainder was purchased and acquired by members of the joint family by means of the ancestral property and the accumulated funds and earnings of the joint family; therefore, according to the Hindoo law, the whole property in its devolution as well as disposition was subject to the incidents of joint property. But supposing such property is to be considered and treated as joint property, or as the separate or self-acquired property of *Bennee Ram* or *Ramjee*, it makes no difference as regards the right of the Respondents to succeed, being admitted to be the nearest male relatives, and, therefore, by Hindoo law, the joint heirs of *Bennee Ram*, on the death of his childless widow, *Choteh Bebee*, who, as such widow, succeeded to and was entitled and enjoyed it for her lifetime only, and could not alienate the same beyond the term of her natural life. With respect to the nature of a Hindoo widow's estate, the Appellant's proposition is founded on passages in *Strange's "Hindu Law,"* and goes to this extent, that a widow may alienate movables of her late husband by the *Daya-Bhaga*, the law received in *Bengal*, and both movables and immovables, according to the *Benares* school, where the *Mitacshara* prevails. [Sir LAWRENCE PEEL: Some confusion exists in *Strange's "Hindu Law,"* Vol. I., pp. 27, 31 (2nd Ed.), by confounding *Stridhana*, the wife's peculiar property, with the property of her husband.] That passage in *Strange's "Hindu Law,"* proves too much, as it in-

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

1866.
 MUSSUMAT
 THAKOOR
 DEYHEE
 v.
 RAI BALUK
 RAM.

cludes property which a woman may have acquired by inheritance, purchase, or finding. Inheritance there referred to has the signification of property acquired by her mother, and at pp. 51, 248 of the same volume, he treats the power of a widow to alienate the property derived from her husband as distinct from her power to alienate her *Stridhana*. Here the property in dispute is to be considered only as inherited property. No issue raised that any portion was acquired by *Choteh Bebee* herself. In the case of *The Collector of Masulipatam v. Cavalry Vencata Narrainapah* (a) the *Pundit*, to whom the question was referred, states for what purposes a widow may alienate her husband's estate against her next heirs. Our contention is, that the interest a widow of a man dying without issue takes in his estate is only a tenant for life, and that she has no power to alienate or devise any portion of such estate; which at her death devolves upon her husband's heirs; *Keerut Sing v. Koolahul Sing* (b)—except under special circumstances with the heirs' consent: *Mohun Lal Khan v. Ranee Siroomunnee* (c). [Sir W. J. COLVILE: Lord *Gifford*, the Master of the Rolls, in the case of *Cossinauth Bysack v. Hurrosoondery Dossee*, which was heard before the Privy Council, in 1829 (d), affirms that principle, and says the extent and limit of her power of disposing of the property are not definable in the abstract]. The *Mitacshara* is silent as to the limit. This Court, in *Katama Natchier v. The Rajah of Shivagunga* (e), treated the interest of a Hindoo.

(a) 9 Moore's Ind. App. Cases, 539.

(b) 2 Moore's Ind. App. Cases, 331.

(c) 2 Ben. Sud. Dew. Rep., 32.

(d) Morton's Cal. Rep., 85.

(e) 8 Moore's Ind. App. Cases, 529, 556.

widow, succeeding to her husband's estate, according to the *Mitacshara* prevailing in *Madras*, as that of a tenant in tail by English law, representing the inheritance. The true principle recognized by all Hindoo authorities is really only the right to maintenance of the widow. *Strange*, "Hindu Law," Vol. I., pp. 121, 234 (2nd Ed.), and he considers her only as trustee for her husband's heirs.

Then as to the question of fact, the execution of the alleged deed of gift. It was clearly a forgery, and the person of *Choteh Bebee* simulated before the Registrar of deeds. Not only was such deed of gift inoperative as regards the passing of the property, even if the property or any part had been proved to be *Choteh Bebee's* absolutely; but the Appellant failed to prove the due execution by *Choteh Bebee*. The evidence as well as probabilities of the case, strongly militated against the evidence offered by her, and the decree of the *Sudder* Court holding that it was a forgery and that no act of adoption had taken place was well founded.

Mr. *Forsyth*, in reply.

The consideration of the case was adjourned.

Their Lordships' judgment was now delivered by

The Right Hon. Sir JAMES W. COLVILE :

The question on this appeal is the right of succession to certain property of which one *Choteh Bebee*, a Hindoo widow, died possessed. She was the widow of one *Ramjee*, who died in 1824 without issue, and he was the only son and heir of *Benee Ram*, one of the five sons of *Rai Sahuji Ram*. The Respondents are all descended from the last-named ancestor through

1866.
 MUSSUMAT
 THAKOOR
 DEYHEE
 7.
 RAI BALUK
 RAM.

1st Feb.,
 1867.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

one or other of his four other sons, and are admitted to be the collateral male heirs of *Ramjee* living at the date of his widow's death. The Appellant is the niece of *Choteh Bebee*, her brother's daughter. She is said to have been from her infancy adopted by her aunt, and treated as a daughter. But the word "adopted" must here be taken in its popular, and not in its technical sense. It is not now contended that the adoption was of that kind which, according to Hindoo law, would create between *Choteh Bebee* and the Appellant the relation of parent and child for all religious and legal purposes, or give to the latter any right of inheritance. The question in this case is, whether the property in dispute on the death of *Choteh Bebee* descended to the Respondents as the collateral heirs of her husband then living, or passed, under a deed of gift alleged to have been executed by her shortly before her death, to the Appellant. That property is partly movable, and partly immovable. The latter is situated in the Districts of *Tirhoot*, *Behar*, *Shahabad*, and *Benares*, and the deceased was domiciled at *Benares*. Therefore, the law by which the succession to the whole is governed is that of the Western schools.

The issues recorded in the cause were, whether *Mussumat Choteh Bebee* was competent to bestow the property in gift or not; and if she was, whether the deed of gift relied upon by the Defendant (now the Appellant) is valid or not. This appears from the Record. Between the date, however, at which the issues were recorded and that of the trial, a change took place in the constitution of the Court of the Principal *Sudder Ameen* of *Benares*, in which the cause was pending; and Mr. *Smith*, by whom it

was tried, in his judgment, says: "The disposal of the case rests on two important issues, first, whether the property which was the subject of the gift to the Defendant was joint ancestral or not; second, whether the alleged deed of gift is or is not a *bonâ fide* instrument. The first of these questions, as will hereafter be shown, is by no means identical with the first recorded issue. Mr. *Smith*, however, having decided it in favour of the Appellant, appears to have considered that the necessary consequence from his finding was, that *Choteh Bebee* was legally competent to alien the property; and further found that she had duly executed the deed of gift. He, therefore, dismissed the Respondent's suit, with costs. There was an appeal to the *Sudder* Court of *Agra*, and that Court, confining its attention to the second of the recorded issues, and after taking further evidence as to the *factum* of the alleged deed of gift, came to the conclusion that the instrument was forged, and on that ground alone made a decree in favour of the Respondents. The present appeal is against that decree.

Their Lordships, reverting to the recorded issues, will consider them in their inverse order. They will first consider whether the evidence in the cause can be taken to have established that the alleged deed of gift was duly executed by *Choteh Bebee*.

The case set up by the Appellant is the following: In 1858, *Choteh Bebee* undertook a pilgrimage to *Juggernaut*. She was accompanied by the Appellant, the Appellant's brother, *Balkishen*, *Nathoo Ram*, a Priest, and *Bunsee*, a menial servant. On her return homewards from the Shrine, and a few days before she reached *Midnapore*, she was attacked

1866.
 MUSSUMAT
 THAKOOR
 DEYHER
 v.
 RAI BALUK
 RAM.

1866.
 MUSSUMAT
 THAKOOR
 DEYHEE
 v.
 RAI BALUK
 RAM.

with dysentery, and arrived at *Midnapore* very ill, and despairing of recovery. The instrument itself expresses that she had no hope of getting home alive. It was prepared by *Hurry Doss*, a Pleader in the Judge's Court of *Midnapore*, and by his nephew and Clerk, *Deenbundhoo Muttie*. It was written in *Bengalee*, a language foreign to the person by whom it purported to be executed—a language which it is admitted she did not understand. It was executed at the door of the *Cutcherry* of the Registrar of deeds, to which place both *Choteh Bebee* and the Appellant were taken in separate palanquins, and there registered. The Appellant says, "After the registry was effected we returned home, and left the station." *Balkishen* says that *Choteh Bebee* remained at *Midnapore* about two days after the deed was executed and registered. All the witnesses who speak to the fact seem to agree that she died about thirteen or fourteen days after the execution of the deed at a place called *Gobind Chuttee*, distant about seven days' march from *Midnapore*, and that her body was there burned.

We have now to consider the evidence given to prove this transaction more minutely; and first it may be well to see what evidence there really is that the person who put her hand to the instrument was *Choteh Bebee*.

The subscribing witnesses to it are *Balkishen*, *Nathoo Ram*, *Bunsee*, and four Bengalees, viz., *Tarachund Muduk*, *Modhoo*, a *Chowkeedar*, *Sree Chedum Surma* or *Chedum Sirdar*, and *Deenbundhoo*, who was concerned in the preparation of the deed. The first three of the Bengalee witnesses may be at once disposed of. Neither their subscriptions nor the

testimony of such as have been examined can add anything to the credibility of the transaction. *Tarachund* almost admits that he was called out of the crowd about the door of the *Cutcherry* to become a subscribing witness, without previous knowledge of the parties or of the transaction. He says that *Chedum Surma*, elsewhere called *Chedum Sirdar*, and *Modhoo* the watchman, were unable to write, and he does not know who signed for them; whilst *Balkishen* says, "Those witnesses who could write signed for themselves, and those who could not *Deenbundhoo* signed for them." *Chedum Sirdar* does not seem to have been examined, and *Modhoo* was probably a witness of the same class with *Tarachund*; for his statement that he, a village watchman, had been admitted into the presence of *Choteh Bebee*, or had been requested by her to sign the deed, is utterly incredible. Besides the evidence of the subscribing witnesses, we have that of *Hurry Doss* and *Shamchund Ghose*, who took upon themselves to identify *Choteh Bebee* to the Registrar. But it is obvious that they could only speak to her identity from information derived from those who travelled in her company, or from the person spoken of as the *Chowbey*. He was the only resident in *Midnapore* who it is pretended had ever seen or known *Choteh Bebee* before this transaction. He was a *Pundah*, a sort of Priest, who had migrated to *Midnapore* from the Upper Provinces, and there dealt in sweetmeats. His name is not given, and he appears to have been known only as the *Chowbey-Hulwai*, an appellation which expresses both his *status* as a Brahmin and his occupation as a Confectioner. What was the extent of his previous acquaintance with *Choteh Bebee* does not appear.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.

RAI BALUK
RAM.

Balkishen says, " She knew a *Chowbey* of *Muttra* at *Midnapore*. On going to *Juggernaut* she saw the *Chowbey*, who kept a shop, but did not halt at *Midnapore*; she halted further on." But whatever was the extent of his acquaintance, the *Chowbey* neither attested the deed nor appeared before the Registrar to identify her, nor gave evidence in the cause. When the examination of the additional witnesses took place at the instance of the *Sudder Court*, he had disappeared from *Midnapore* and could not be traced. There is, therefore, no evidence of the identity of the person who signed the deed with *Choteh Bebee* except that of the Appellant, her brother, their dependent the Priest, and a servant. This might have been corroborated by satisfactory evidence of the handwriting; but from the evidence on that point and a comparison of the *Nagree* signature on the deed with the admitted signature of *Choteh Bebee* upon other documents, the *Sudder Court* has come to the conclusion that the former is a forgery. The testimony, too, of the *Kobiraj*, or native doctor, if forthcoming, might have afforded some slight corroboration of the story. He could at least have proved that he was called in to attend a woman dangerously ill of dysentery, and have shown in what state of body or mind his patient was.

Again, there is no evidence, except that of the four persons above mentioned, of the time and place of *Choteh Bebee's* death. Their testimony on that point might have been corroborated by that of the police authorities of the station where she is said to have died. But that corroboration is wanting.

We will next consider the evidence touching the preparation and execution of the deed. It seems

clear that *Hurry Doss*, the Pleader, was called in on the night of the arrival of the party at *Midnapore*. He is the person called *Sreedhur Moonshee* by the Hindustani witnesses. There is a good deal of discrepancy in the evidence as to the manner of calling him in. He himself says, that *Balkishen* and *Nathoo Ram* called on him, and said he had been recommended to them by the *Chowbey*. *Shamchunder Doss*, who seems to have been hanging about the house where the Pilgrims put up, professes to have directed them to *Hurry Doss*. *Bunsee* says, "the *Chowbey* sent for *Sreedhur Moonshee*." *Nathoo Ram*'s evidence is to the same effect; and *Balkishen* says that he "and the *Chowbey* went to *Sreedhur Moonshee*, who sent for the writer" (*Deenbundhoo*). These discrepancies, however, are not of much importance. It is clear that *Hurry Doss* went to the house where the woman alleged to be *Choteh Bebee* was, on the night of her arrival; and, though the evidence is not altogether consistent on that point, that he took *Deenbundhoo* with him.

Hurry Doss being the professional person responsible for the preparation of the document, it is to his evidence that we naturally look for a true account of that part of the transaction. His statement is to this effect: "I found *Choteh Bebee* lying down. She said, 'Are you a *Vakeel*?' I said, 'I am.' She said, 'All my property I wish to make over in gift to *Thakoor Deyhee*, my niece'—who was then sitting by her. I asked what estate (*Talooqua*), and what property, that a rough copy might be prepared. She said, 'To-night I am not at all well, but to-morrow morning I will have it all written out.' I then returned that night to my house. The next morning

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

1866.
 MUSSUMAT
 THAKOOR
 DEYHEE
 v.
 RAI BALUK
 RAM.

I sent *Deenbundhoo* to take a list, and ascertain what she wanted to have written. He went, and took down all particulars. I said the whole of the property was to be made over, and that she had no stamp paper. I then drew out a deed of gift in the Bengalee language, and I sent *Deenbundhoo* with it to *Choteh Bebee* to be read to her, and ascertain whether it was what she wanted. *Deenbundhoo* returned, and said she had agreed to what I wrote. The next day I had it all clearly written out on stamp paper, and brought it to the *Cutcherry*. *Choteh Bebee* and *Thakoor Deyhee* also came in *palkees* to the Court, and I then read out to *Choteh Bebee* the contents of the *Hibbenamah* and she signed it with her own hand. *Choteh Bebee* was then taken in a *palkee* before the Registrar, the door of the *palkee* was opened, and the *Nazir* questioned her by the Principal *Sudder Ameen's* orders, and she admitted that she had executed the deed. I received back the *Hibbenamah* after registry, and the next day took it to *Thakoor Deyhee* through *Balkishen*."

From this statement it is to be inferred that on the first evening nothing was expressed but a general intention to make a gift of the whole property; that on the following morning the Pleader obtained more particular instructions through *Deenbundhoo*; that he then, in his own house and with his own hand, drew up the draft deed, and sent it by *Deenbundhoo* to be explained to the woman; that on the following day he had the engrossment made on stamp paper in his own house, and took it thence to the Court-house, where he met the two women in their *palkees*; that he read over the fair copy to the woman said to be *Choteh Bebee* outside the Court, who executed it

there; that she was then taken in her *palkee* before the Registrar, and to him or his *Nazir* acknowledged her signature. One would have expected that this account would have been confirmed, at least by the Clerk, *Deenbundhoo*, in all its material particulars. This, however, is not the case. His statement is that on the night when, according to *Hurry Doss*, *Choteh Bebee* was too ill to give full instructions, he remained behind and took down from her dictation what he calls a list containing the names of her husband and her father; that the rough copy of the deed was drawn out the next day, and was clearly written out and taken to her by him. In another part of his evidence he says that *Hurry Doss* prepared the rough copy of the deed in her house; that *Choteh Bebee* explained to him what she wanted done, and that he (the witness), at *Choteh Bebee's* request, wrote the copy out clearly on paper. (This probably means the copy on stamp paper.) He says that on the same day (being the day after the evening on which *Hurry Doss* was first called in) the two women came to the *Cutcherry*, and that the deed was then and there executed and registered. He does not state how, or by whom, the Bengalee instrument was explained to her. The testimony of the Hindustani witnesses, on the whole, tends to confirm the statement of *Deenbundhoo* rather than that of *Hurry Doss*. Both *Nathoo Ram* and *Balkishen* say that both the draft and the fair copy of the deed were written and explained by *Deenbundhoo* at *Choteh Bebee's* house. They do not speak to the fair copy having been explained to her by *Hurry Doss* at the *Cutcherry* when it was executed. They say that the deed was written and executed on the same day, viz., that following the evening of *Choteh*

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

Bebee's arrival at *Midnapore*. *Bunsee*, however, states that the fair copy on stamp paper was written at the *Cutcherry*, and that the deed was written after remaining three days at *Midnapore*.

Here, then, their Lordships have to deal with an instrument avowedly taken *ex capite lecti* from a woman stricken with a mortal disease, and in expectation of death—that woman being one of a class which the law regards as in need of especial protection. Whatever strictness is required in the proof of a testamentary disposition, is, at least, equally required here. The document is written in a character and language which, if in the fullest possession of her faculties, she could neither read nor understand. The accounts given by the witnesses of its preparation and explanation are inconsistent and unsatisfactory. If it were even established that the person who put her hand to the paper were *Choteh Bebee*, the proof would still fall short of that which ought to be given to support such a transaction—proof that she really knew what she was about, and intended to make this disposition of her property.

Again, the circumstances of the execution are, in their Lordships' judgment, extremely suspicious. This sick and almost dying woman is said to have been carried down on the afternoon of an *August* day, and deposited at the door of the *Cutcherry*. Whilst lying there she has the instrument explained to her, for the first time, by the person chiefly responsible for its preparation, through the half-opened doors of her Palanquin. She executes it, and some of the witnesses of her act are picked up then and there out of the crowd. One witness says that the deed itself was fairly copied at this time and place; several—and that is far more

credible—that an additional copy for registration was then made. After all this ceremony is gone through she is carried into Court, and questioned by the *Nazir*.

Now, she might certainly have executed the deed in the privacy of her own house. Nor does she seem to have been bound, by the Acts and Regulations touching registration, to appear personally before the Registrar, in order to have it registered. She might have sent it for that purpose by a duly authorized representative, with one or more of the witnesses, who could speak to her execution of it.

Appearance in a public Court, even under the protection of a Palanquin, is a thing repugnant to the feelings and habits of a Hindoo woman of *Choteh Bebee's* position, even when she is in perfect health. The same feeling might not operate on one who personated her, or on one who sought to profit by the fraud. And the extraordinary publicity resorted to on this occasion seems more likely to have been designed to give a colour to a false transaction than to have been an incident in a regular one.

Considering, then, the whole evidence and the startling improbabilities of the case set up, their Lordships are of opinion that the Appellant has failed to establish the validity of the deed of gift on which she relies. It is not necessary to say that on this evidence she and her witnesses must be taken to have been guilty of conspiracy, perjury, and forgery. It is sufficient to say that the proof falls very far short of what is required to support the affirmative of the issue, which she was bound to prove.

If the Appellant were suing to recover possession of the property from the Respondents by virtue of

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

the deed of gift, the conclusion to which their Lordships have come would of course determine the cause. That, however, is not the nature of the suit; and the Respondents, being the Plaintiffs below, have to show a title to the relief which they claim. The object of their suit, as stated in the plaint, was to be confirmed in the possession of the various parcels of immovable property which are therein specified; to recover certain movable property which seems to have been under attachment; to have the deed of gift cancelled and set aside; and to avoid the title which the Appellant was then understood to claim by virtue of adoption. The first things to be determined are the *status* of the family and the nature of the property.

The Respondents alleged in their plaint that the family of the common ancestor, *Sahuj Ram*, including *Benee Ram* and *Ramjee*, had continued to be undivided. But the evidence, and above all the indisputable fact that *Choteh Bebee* was in possession of the greater part of the property in dispute, as heiress of her husband, for upwards of thirty years, seem to their Lordships to support the finding of the Principal *Sudder Ameen*—that *Ramjee* was not a member of an undivided family, of which the Respondents, whatever be their *status*, *inter se*, are or represent the other co-parceners; *Benee Ram* having separated from his co-heirs, and taken as his share of the ancestral estate the villages in *Tirhoot*, which form the first parcel of the immovable property that is the subject of this suit. Their Lordships also accept as true the history which has been given by the learned Counsel for the Appellant of the acquisition of the other parcels of immovable property.

The state of the family and the nature of the property having been thus ascertained, the only question is, whether the Respondents became entitled to the possession of it on the death of *Choteh Bebee* as the next heirs of her husband. The Appellant's supposed title by adoption has been abandoned, and the validity of the deed of gift has already been disposed of. It is difficult, however, to deal with the remaining question without adverting to the arguments which have been addressed to their Lordships in support of *Choteh Bebee's* power to dispose of the property, since the right of the husband's collateral heirs depends in some degree on the nature of the widow's estate.

The learned Counsel for the Appellant; whilst they admitted that, by the law as it prevails in *Lower Bengal*, the estate of inheritance which a Hindoo widow takes in the property of her husband, dying without male issue, is limited in its enjoyment; that she cannot alien such property, whether movable or immovable, except for certain defined purposes, and subject to certain restrictions; and that it passes on her death to those who are then the next heirs of her husband—have nevertheless contended that this is not the law of the Western schools, and have attempted to show that at *Benares* and in the other Provinces governed by the *Mitacshara*, the widow's estate in her husband's property is absolute; that she has full power to dispose of it; and that, if she fails to do so, it is after her death subject to a different course of succession from that which obtains in *Bengal*.

The opinion of the Pundit taken by the *Sudder* Court does not support this contention in its in-

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

G. N. D.
Advocate High Court
Jammu & Kashmir
Srinagar.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

tegrity. He admits the right of the widow to alien movable property, whether ancestral or not, and the immovable property acquired by her husband or herself, with the proceeds of the former's share in the ancestral estate; but he denies her right to dispose of her husband's share in immovable ancestral property, and states that on her death it devolves on her husband's next of kin. He does not show that, if she does not exercise her alleged power of disposition over property of the two other classes, that does not also pass on her death to her husband's heirs.

The learned Counsel for the Appellant relied mainly on arguments drawn from the 1st and the 11th sections of the 2nd chapter of the *Mitacshara*, and on the supposed confirmation of them by Sir *Thomas Strange*. The first of these sections deals with the right of the widow to inherit the estate of one who leaves no male issue. It states the various conflicting authorities on the subject—some favourable, others adverse to the widow's right; it weighs and contrasts them, and comes ultimately to the conclusion embodied in the 39th Article, viz.: "Therefore, it is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently reunited with them, dies without male issue." It need hardly be observed that the rule thus stated merely affirms the widow's right of succession, with a qualification unknown to the law of *Bengal*—viz., that her husband was not at the time of his death a member of an undivided family. The text is wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. It may also be conceded that nothing on those points

is to be found in the rest of that portion of the *Mitacshara* which has been translated by Mr. *Colebrooke*, and published under the title of "The Law of Inheritance from the *Mitacshara*." It is not, however, a necessary consequence from these circumstances that the *Benares* school recognizes in the widow an absolute power of disposition over the estate which she has inherited from her husband, other absolute interest therein. We have not the whole *Mitacshara*. Mr. *Colebrooke*, in his preface, p. iv., states that his work includes only an extract from that celebrated Treatise, comprising so much of it as relates to inheritance. The widow's disabilities, which depend in a great measure upon the notions which the Hindoo legislators entertained of the infirmity and necessary dependence of the sex, may be dealt with in other parts of the work. It is certain that upon other subjects the *Mitacshara* cites with approbation *Menu*, *Catayana*, *Nareda*, and others, upon whose *dicta* the limitation of the widow's enjoyment of her husband's estate, and of her power over it, chiefly depends; and that these authorities are received by the Western schools as well as by that of *Bengal*. Accordingly Sir *Thomas Strange* (vol. i., p. 247) states clearly that such limitations are, with some slight variations, common to all the Schools.

A more plausible argument in favour of the Appellant's contention may be derived from the eleventh section of the 2nd chapter of the *Mitacshara*, if the words "also property which she may have acquired by inheritance," which occur in the 2nd article of this section, are taken (as they are taken by Sir *Thomas Strange* and others), to include property inherited from a husband. For it may be said that

1866.
 MUSSUMAT
 THAKOOR
 DEYHEE
 v.
 RAI BALUK
 RAM.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

there can be no distinction between different portions of a woman's *Stridhun*, or separate property: if she can dispose of part of it she may dispose of the whole; and further, that the whole must pass on her death, according to the law which regulates the succession to *Stridhun*. Sir *William Macnaghten*, however, in his "Principles and Precedents of Hindu Law," vol. i. p. 38, lays down broadly that there is such a distinction. He says: "In the *Mitacshara*, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*." And he then proceeds to show what is that *peculium* or *Stridhun* proper, according to *Menu*.

Certain it is, that whilst no decided case has been cited in support of the Appellant's contention, there are many to show that according to the *Benares* and other Western schools, the power of a widow over property inherited from her husband is limited, and that on her death it passes to his heirs. The case of *Keerut Sing v. Koolahul Sing* (2 Moore's Ind. App. Cases, p. 331), where the property in dispute was situate in the District of *Benares*, is directly in point. To the same effect are the cases at pp. 32 and 189 of the second volume of *W. H. Macnaghten's* "Principles and Precedents of Hindu Law." Several of the cases set forth in the appendix to the tenth chapter of Sir *Thomas Strange's* work, with the remarks of Mr. *Colebrooke* and others thereon, also support this view. (See 2 *Strange's* "Hindu Law," pp. 402, 407, 408, 439). The *Vivada Chintamani*, which has been recently translated by *Baboo Prossonno Coomar Tagore*, and is of high authority in the *Mithila* school, and in

the District of *Tirhoot*, where some of the lands in dispute are situate, expressly shows that the widow has no power of disposition over the immovable property of her husband, and that his heirs take it on her death. (See pp. 261 to 263.) The doctrine has been assumed as incontestable in the more recent cases, like that of *The Collector of Masulipatam v. Cavalry Vencata Narrainapah* (8 Moore's Ind. App. Cases, p. 528). The result of the authorities seems to be, that although according to the law of the Western schools the widow may have a power of disposing of movable property inherited from her husband, which she has not under the law of *Bengal*, she is by the one law, as by the other, restricted from alienating any immovable property which she has so inherited; and that on her death the immovable property, and the movable, if she has not otherwise disposed of it, pass to the next heirs of her husband. There is no trace of any distinction like that taken by the Pundit between ancestral and acquired property. In some of the cases cited the property was not ancestral.

Again, supposing that any of the property claimed in this suit were of the nature of *Stridhun*, and passed as such, the Respondents would seem to have a better title to it than the Appellant. The devolution of *Stridhun* from a childless widow is regulated by the nature of the marriage. There is nothing here to show that *Choteh Bebee* was not married according to one of the four approved forms. In that case her *Stridhun* would, according to the *Mitacshara* (chap. ii. sec. xi., art. 11), go to the Respondents as the collateral heirs of her husband. The view of the law is confirmed by two cases in 2 *Strange's*

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

1866.

MUSSUMAT
THAKOOR
DEYHEE

v.
RAI BALUK
RAM.

"Hindu Law," pp. 411 and 412, and the comments of Mr. *Colebrooke* and others thereon. Upon this record, however, it seems admitted that the whole of the property in dispute was either inherited from the husband, *Ramjee*, or the fruit of its accumulations.

Their Lordships, then, are of opinion that *Choteh Bebee* had no power of disposition over the immovable property inherited from her husband, whether ancestral or acquired. Whether she had any such power over his movable property it is unnecessary to determine; since it has been found that no valid disposition of either kind of property has in fact been made. And this being the case, their Lordships are of opinion that, as between the parties to this record, the right to the possession of the whole of the property in dispute, on the death of *Choteh Bebee*, passed to and became vested in the Respondents.

The decree impeached is, therefore, substantially right. Whether it is altogether right in point of form may be doubted. It contains an order that the Respondents should recover from the Appellant the possession of the immovable property, with mesne profits from the date of the institution of the suit; whereas the plaint seems to admit that the whole, or a large portion, of such property was at that date in the Respondents' possession, and made no demand for mesne profits. The error (if error there be) appears only in the formal decree—not in the judgment upon which it is founded. The recommendation which their Lordships will humbly make to Her Majesty is, that the decree of the *Sudder* Court be varied, and that it be thereby decreed that the Respondents (the Plaintiffs) be confirmed in the

possession of so much of the immovable property in the plaint mentioned as was in their possession at the date of the institution of the suit; and be declared entitled to the movable property; and that they do recover from the Defendant (the Appellant) so much (if any) of the said immovale property as was in her possession at the date of the institution of the suit, with the mesne profits of such last-mentioned property from the said date, together with the costs of suit in both Courts. Their Lordships, however, are of opinion that, notwithstanding the variation of this decree, the Appellant must pay the costs of this appeal.

1866.
 MUSSUMAT
 THAKOOR
 DEYHER
 v.
 RAI BALUK
 RAM.

J. P. WISE and JUGGUNATH ROY }
 CHOWDRY ... } *Appellants,*

AND

SUNDULONISSA CHOWDRANEE and }
 others ... } *Respondents.**

*On appeal from the Sudder Dewanny Adawlut,
 at Calcutta.*

THIS suit was brought in the Court of the Principal *Sudder Ameen* at *Dacca*, by the Appellants and one *Denomoney*, since deceased, to recover possession

8th & 9th
 Feb., 1867.

° Present :—Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

A *nicka* marriage between a Mahomedan and a woman of inferior station, and the legitimacy of the child of such marriage established.

The *Sudder* Court discredited the evidence in favour of such marriage (which the Principal *Sudder Ameen* believed), and without taking the

1867.
 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

from the Respondent, *Sunduloonissa Chowdranee* and others, an eight-sixteenth annas share of the *Zemin-dary, Talooks*, and *Khanaterreo* of *Shorail* pertaining thereto, called *Pergunnah, Russulpore*, of which eight shares the Plaintiff, *Denomoney*, and her minor son, *Fyzoollah Chowdry*, claimed to be entitled to a four annas share, the Appellant, *Wise*, to a twelve and a half annas share; and the other Appellant, *Juggunath Roy Chowdry*, to a one and a half annas, the two shares last mentioned having been purchased from *Denomoney*.

The main question at issue in the suit was one of fact, whether a *nicka* (an inferior kind of marriage among Mahomedans, requiring only declaration and acceptance) had taken place between *Akhlakoollah Chowdry*, a Mahomedan, and *Denomoney*, and consequently whether *Fyzoollah*, the issue of such marriage, was the legitimate son and heir of *Akhlakoollah Chowdry*. The suit was heard before *Moulvee Mahomed Nazim Khan*, the Principal *Sudder Ameen* at *Dacca*, and by the decree of that Court it was found that *Denomoney* was married *nicka* to *Akhlakoollah Chowdry*, and that *Fyzoollah* had been acknowledged by the latter to be his son, and was entitled to an eight annas share of his property; and it further declared, that an alleged Will by *Akhlakoollah Chowdry*, set up by the principal Respondent, *Sun-*

direct testimony upon that fact into consideration, inferred from the probabilities of the case that no such marriage had taken place. Held, by the Judicial Committee, reversing such decree, that although in a question of disputed fact regarding the credit due to witnesses, irrespective of the probabilities of the case, the appellate Court is reluctant to compare the conflicting decisions of the two Courts, and decide the case on a conflict of testimony nearly balanced, by a preponderance of probabilities, yet that, in the circumstances, though the Native testimony was open to suspicion, the duty of a Court of ultimate appeal was to judge from the evidence and not to infer from probabilities.

duloonissa, his elder wife, in favour of herself and her son, was a forged instrument, fabricated by her in order to deprive *Denomoney* and her son of their shares as co-heirs with her son of the estate of *Akhlakoolah Chowdry*; and it was further decreed, that a deed of marriage settlement, which was said to have included the property in dispute, relied on by *Sunduloonissa* as having been executed by *Akhlakoolah*, was not proved. The decree of the *Sudder Dewanny Adawlut*, composed of Messrs. *H. T. Raikes*, *G. Loch*, and *H. V. Bailey*, against which the present appeal was brought, decided that the question of marriage of *Denomoney* was to be determined before entering into the questions raised by *Sunduloonissa* in her defence, and without taking into consideration the evidence in support of the marriage; held, that the marriage had not been sufficiently proved, and reversed the *Sudder Ameen's* decree with costs. Hence this appeal.

1867.
 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

A summary of the pleadings and evidence sufficiently appears in their Lordships' judgment.

The appeal was heard *ex parte*, and was argued by Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellants.

Judgment was delivered by

The Right Hon. Sir RICHARD T. KINDERSLEY.

This case comes before their Lordships as an *ex parte* appeal, brought by Mr. *J. P. Wise* and *Jugunath Roy Chowdry*, two only of the original Plaintiffs, from a decree of the late *Sudder Dewanny Adawlut* at *Calcutta*, which reversed a decree of the Civil Court of *Dacca* in favour of the Plaintiffs.

The original Plaintiffs in the suit were *Denomoney*,

25th Feb.,
 1867.

1867.
 WISE
 7.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

suing in her own right as a widow of a Mahomedan *Zemindar* named *Akhlakoollah Chowdry*, and as Mother and guardian of her minor son, *Fyzoollah Chowdry*, to establish their respective rights, as such, to the succession of *Akhlakoollah* and the Appellants. *Denomoney* died pending the suit, which was continued, on behalf of *Fyzoollah*, by one *Mamtazooder Chowdry*, as his guardian. The Appellant, *Wise*, claims to be the Assignee of the whole of *Denomoney's* share, and of a portion of her son's share, under conveyances from her; and the other Appellant claims to be Assignee of a portion of *Denomoney's* share, under a conveyance from *Wise*, and of a further portion of the minor's share under a conveyance from *Denomoney*.

The Defendants were *Sunduloonissa Chowdranee*, widow of *Akhlakoollah Chowdry*, *Olioollah Chowdry*, his son, and *Meer Saadut Ally*, the husband of a deceased daughter of *Akhlakoollah*, who survived him, and was entitled to share in his estate.

The object of the suit was to establish the marriage of *Denomoney* with *Akhlakoollah*, and the parentage and legitimacy of her son, *Fyzoollah*, as a son and heir of *Akhlakoollah*; and consequently the titles of both to succeed to *Akhlakoollah*, the widow to her share, and her son as a residuary legatee and heir of *Akhlakoollah*.

The suit could have no operation in any question which might hereafter arise as to the effect of *Denomoney's* conveyance of part of her son's property between him and both, or either of the co-Plaintiffs, *Wise* and *Juggunath*.

The cause was decided by the Judge of the Civil Court at *Dacca*, a Mahomedan, in favour of the

marriage of *Deenomoney*, and of the legitimacy of *Fyzoollah*; but this decision was reversed by the *Sudder* Court on appeal, and from that last decree the two Plaintiffs, *Wise* and *Juggunath*, alone appeal, *Denomoney* having died previously to the institution of the appeal. *Fyzoollah* not joining in the appeal, is named by the Appellants as a Respondent.

Their Lordships in this, as in other *ex parte* cases from *India*, are placed in a position of embarrassment and difficulty. It is not explained why *Sunduloonissa*, who is in possession of the estate, which is large, does not appear to support the decree in her favour. It is possible that had the case of the Respondents been argued before their Lordships, some view of it, amidst the conflict of evidence and the opposing presumptions which arise from the evidence, might have been offered to their Lordships' attention which has escaped their own careful and anxious consideration of the evidence and judgments. The Counsel for the Appellants, Sir *Roundell Palmer* and Mr. *Leith*, have argued the case with great candour and completeness. The whole evidence on both sides has been fully presented by them to the attention of their Lordships; but still in such a case there is room for much anxiety and hesitation. The Appellants ought not, however, to suffer by reason of this natural hesitation in a Tribunal about the correctness of its judgment, induced by an omission of the opposite party, nor ought the absence of the latter from the arena to weaken the presumption in favour of a judgment which is given on their side. The *onus* must still lie on the Appellants to show manifest error in the decree appealed from.

The pleadings in this case require attention. The

1867.

Wise

v.

SUNDULOO-

NISSA

CHOWD-

RANEE.

1867.
 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

plaint assigns a date to the marriage, and treats the marriage as having taken place at the time when *Denomoney's* intercourse commenced, or a few days after; but in a subsequent portion of the plaint *Denomoney* states the celebration of the seventh month of her pregnancy, and the celebration of the birth of *Fyzoollah*, circumstances which, if truly alleged and proved, would suffice to prove her marriage and the legitimacy of her son. Consequently, on the plaint as framed, the Plaintiffs would be entitled to recover if this latter portion of the plaint were credited by the Court, and the allegations as to the ceremony and its time disbelieved. The plaint alleges, by anticipation, that *Sunduloonissa* caused a Will to be forged after her husband's death, and enters into arguments to prove that it was forged. The answer of *Sunduloonissa* sets up that Will, and asserts it to be genuine, and relies upon it. In that Will are contained a reference to and acknowledgment by the Testator, *Akhlakoollah*, of a *Kabin*, executed by him on his marriage with *Sunduloonissa*, which, if it were established, would show a prior title in her to the *Zemindary* by conveyance, on good consideration at her marriage, and so overrule entirely the claim of a second wife and her son; whereas a Will simply would be inoperative, even as to a third, without their assent. *Sunduloonissa* in her answer relies also on a *Kabooleat* executed to her by *Denomoney*, for a certain part of the estate, which is, if genuine, an acknowledgment of *Sunduloonissa's* title by *Denomoney*.

These documents are alleged by *Denomoney* to be forgeries.

The issues embrace all these questions; the marriage of *Denomoney*, the parentage of her son,

Fyzoollah, his legitimation, and the genuineness of the Will.

The pleadings in this case, as it has been observed, state the case of each party fully. Nothing comes out in the evidence on the main points in the cause of which some mention is not made in the respective pleadings of the parties.

The case alleged by *Denomoney* is, that she was married by a *nicka* marriage to *Akhlakoollah* at the time of her first consorting with him. She gives the date of the marriage in her plaint. Her case, therefore, as stated by her, excludes the supposition that *Akhlakoollah* raised her to the *status* of wife subsequently on her proving pregnant with a son which he acknowledged to be his. Still the case may be, that she was acknowledged directly or by implication as a *nicka* wife at some subsequent period of the cohabitation. In a native case it is not uncommon to find a true case placed on a false foundation, and supported in part by false evidence. It not unfrequently happens that each case, that of the claim and that of the defence, has to struggle through difficulties in which wicked and foolish managers involve it, by fabrication of evidence and subornation or tutoring of witnesses; and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found. The subsequent allegations in the plaint as to the celebration of the seventh month of her pregnancy, and the celebration of the birth of her son, suffice to let in this proof of marriage also.

The plaint does not disclose the history of *Denomoney* previously to her introduction into the house of *Akhlakoollah*. But the answer of *Sunduloonissa* supplies that omission. The evidence on each side

1867.

WISE

v.

SUNDULOO-

NISSA

CHOWD-


RANEE.

1867.
 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

supports the general account about *Denomoney*, which the answer of *Sunduloonissa* contains in the sixth paragraph, viz., that she was a singing girl, and that she attracted the fancy of *Akhlakoollah*, who brought her to and maintained her in his house. It is said, in the answer of *Sunduloonissa*, that *Denomoney* was brought there whilst still very young. There is no evidence that her life had before then been licentious. The imputation then on her character at this time, which is found in the answer, seems to be founded on her profession of a public native songstress; and though this is not a profession in *India* which is followed by women of character, it is by no means a reasonable presumption that a very young girl, a member of such a company, should be in her early years grossly profligate. This, however, is what the answer of *Sunduloonissa* insinuates as to *Denomoney*, even at this early age, for she says of her that "instead of leaving off her former vicious habits, she continued to indulge her vicious passions;" and then she imputes to her four paramours in succession, to one of whom, *Shumfutoollal Sirdar*, she ascribes the parentage of *Fyzoollah*.

In viewing the evidence given in this case, it will be important to bear in mind that many of the witnesses for the Defendants support these allegations in the answer by evidence as inconsistent as the answer itself, by imputing to *Denomoney* the utmost continuing profligacy of conduct in this respect, so little likely to be condoned by a man of a race prone to jealousy and to the seclusion of their women, and yet not accounting for her continued abode in the *Zenana*. Thus she is represented as very profligate at a very early age, as continuing to be very profligate during her whole cohabitation in the *Zenana* of *Akhlakoollah*,

intriguing with various men openly, without disguise, and to the knowledge of a hostile wife; and yet as continuing in the *Zenana*, preserving her *status* there unimpaired, whatever it was, and treated with outward demonstrations of respect. And what is not a little singular in the alleged life of this woman, to whom such early, such long-continued profligacy is imputed, is, that after the death of *Akhlakoollah* there is no evidence of any profligate life whatever, and she is found to be for a time received as an inmate in the house of a respectable Mussulman on the footing which she ascribes to herself of widow. All this story, therefore, of her previous and continuing profligacy is found on an examination of it inconsistent and incoherent; it does not cohere, and it is not consistent with any of the ordinary presumptions which would be formed on such an intercourse with the Master of a native house in that rank of life.

1867.

 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

Some of the witnesses describe her as being in the *Zenana* not for the ordinary purpose of such an introduction, but simply to divert *Akhlakoollah* with her songs; others say that she was there for the ordinary purpose; *Sunduloonissa* says she was there as a slave girl, of which there is no proof or likelihood. She does not expressly deny the existence at one time of sexual intercourse between *Akhlakoollah* and *Denomoney*; but her answer puts forth that subsequent case of alleged impotency in *Akhlakoollah* to which many of the witnesses, including two native Doctors, depose.

The testimony of these Doctors, on examination of it, proves to be utterly worthless and inconclusive in a medical point of view, even supposing that any dependence could be placed on its truth.

For what purpose is this worthless evidence pro-

1867.
 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

duced? Is it to prove that *Akhlaqollah* could not possibly be the father of *Fyzoolah*? but it proves also that he could not possibly suppose himself to be the father of the boy.

If the story were true which the answer sets up on this point, it is inconceivable that *Akhlaqollah* should believe himself to be the father of this child; for the story is, that he had become, some years before his birth, incurably unable, to his own knowledge, of having any sexual intercourse; that the knowledge of his complaint and its consequences was general in the house: and yet this very man, in this state, who had a legitimate son and daughter, is supposed to be keeping in his *Zenana* a woman who was conducting herself with open profligacy with menial servants, discovered and yet not dismissed. What reason does the answer of *Sunduloonissa* give for such a toleration of offences, generally so little likely to be pardoned by a Mussulman? She says, the truth is, that for her bad character he ordered her to be put out of the house, but kept her there at the request of other parties. No other explanation is given; that given is of so startling an improbability, by reason of its generality, and the entire absence of evidence to support it, as to be unworthy of any credit. Consequently the attempt has been made, and has wholly failed, to render this marriage improbable by reason of the turpitude of the alleged wife. The improbability is reduced to this: that he married a female by a *nicka* marriage whom he might probably have obtained on easier terms as an inmate of his *Zenana*. The failure of this attempt and of this evidence to blast the character of the rival Claimant as wife certainly tends to strengthen the case that she sets up.

There is no other intrinsic improbability, then, in this story of his having married, by a *nicka* marriage, a girl of this profession, than that which attaches to it as a disreputable connection with one who probably would have made no difficulty about entering his *Zenana* on easier terms.

This is an improbability not of a light character, and the evidence to support it ought to be evidence probable in itself and free from suspicion. The burthen of the proof was of course on the Plaintiffs. It is impossible for their Lordships to form any opinion on the credit due to witnesses by reason of their *status* and apparent claims to be trusted, which is at all worthy to be compared to that which is formed by a Judge fit for his office, who sees them, hears them, and probably knows something of their antecedents. This cause between Mahomedans was tried before a Mahomedan Judge. Of the probability of the acts imputed to a Mahomedan *Zemindar* he is a more competent judge than either the European Judges of the *Sudder* Court or their Lordships can be. His judgment seems to have been carefully formed, and his observations upon the witnesses are entitled to a respectful consideration. Had their Lordships found that his observations upon the witnesses themselves were opposed to the opinion of the *Sudder* Court upon the credit due to those witnesses, irrespective of the probabilities of the case, they must necessarily have compared the conflicting opinions, and the result might have been a conclusion that the case must be decided, in a conflict of testimony nearly balanced, by the preponderance of probabilities. But if there be found, even in a Native case, positive credible testimony unimpeached, and credited by a Judge compe-

1867.

WISE

v.

SUNDULOO-
NISSA
CHOWD-
RANEE.

1867.
 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

tent to judge of the credit due to witnesses, it would seem to be equivalent to a total disregard of Native testimony, to say, despite of this positive testimony, we will put all evidence aside, and act alone on the probabilities of the stories and the inference from the conduct of the parties.

When the cause came by appeal before the Judges of the *Sudder* Court, they, unfortunately, instead of reviewing the whole case and expressing their opinion upon all the points on which the Court below had based its conclusions, which were conclusions of fact, narrowed their inquiry to the simple question whether the Plaintiff, *Denomoney*, had proved her marriage. Now, the Judge below, in dealing with that question, had brought, and properly brought, to the consideration of it certain inferences from the conduct of *Sunduloonissa*, which he judged corroborative to some extent of the truth of the Plaintiff's story. These were inferences which he drew from the fabrication of documents set up by the Defendants, and which the Plaintiffs alleged to be forged, viz., an alleged Will, a *Kabooleat*, and certain receipts, which they (the Plaintiffs) alleged to have been fabricated to defeat a claim which the Defendants dreaded. The argument for the Plaintiffs was this: "Unless *Denomoney's* claims and that of her son were judged to be formidable, why this fabrication of documents?" The answer given below was, the documents are genuine. The Judge below found that they were forged. Their bearing on the issue as to the marriage was direct and important. Yet the Court of Error dismissed entirely from their consideration the question of the genuineness of those documents.

Again, the Judge below had believed the witnesses

for the Plaintiffs who deposed to the marriage of *Denomoney* and the legitimacy of her son, *Fyzoollah*. The *Sudder* Court did not examine at all into his reasons for believing the evidence. So far from saying that the evidence for the Defendants was more weighty, they attached but little weight to it; but they decided against and reversed the finding of the Judge below, merely on inferences from the conduct of *Akhlakoollah* and from that of *Denomoney* herself. Though they appear to have been mistaken in calling *Denomoney* a Hindoo, who, according even to some evidence of the Defendants, had conformed to Mahomedan usages, they say, and say truly, that the marriage was an improbable occurrence; but though improbable, it was certainly capable of being proved by direct and credible testimony, as to the value of which they forebore from inquiring. What were the inferences on which they acted? The first is that *Akhlakoollah* took no steps in his lifetime to make a public official declaration of any kind of his *nicka* marriage, and of the legitimation of his child. This child was little more than three years old when *Akhlakoollah* died. He died suddenly, of a suddenly contracted disease, cholera; and no inference against the marriage can reasonably be drawn from such light data. With respect to *Denomoney's* own conduct, her non-opposition to the mutation of names on the production of the Will is mainly relied on. But it is to be observed that a few months only elapsed between the death of *Akhlakoollah* and this act; that knowledge of it is not brought home to *Denomoney*; and that it would be too much to presume her, a native Lady whose very *status* was disputed, and without means, armed at all points with

1867.

WISH

v.

SUNDULOO-
NISSA
CHOWD-
RANEE.

1867.
 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

means of knowledge, and pecuniary means, and friends able to assist her then. There is the less reason for making this presumption in the present case, that it plainly appears that Mr. *Mackillup*, the Magistrate who inquired into the circumstances and heard the evidence as to the alleged imprisonment of her, and the duress practised on her, did believe the story, and attributed the withdrawal of her charge to some influence exercised upon her. His view of the case gives an air of probability to her version of her conduct on this occasion. These presumptions, then, seem to their Lordships too feeble to overpower or materially to weaken the evidence in proof of her marriage and legitimacy on which the Judge below acted; and as the *Sudder* Court went not at all into the consideration of the evidence for the marriage and legitimation, and opposed only insufficient inferences to it, the weight of the opinion of the Judge below on these facts stands really unshaken.

The answer, it has been shown, sets up a Will; it also alleged that *Denomoney* accepted a *Pottah* of certain land, and gave a *Kobooleat* to the Defendant, and took certain receipts. These were all found by the Judge below to be fabricated documents. The *Sudder* Court expressed no opinion about them; and it remains for their Lordships now to do, unaided by any judgment of the *Sudder* Court, that which they would have been able to do if assisted by such judgment, viz., to examine the grounds which the Court below had for such conclusion. Their Lordships conceive that if in this case the Defendants are found fabricating documents, and getting up false testimony to meet the case alleged, the reasonable conclusion is that it must have appeared at least a formidable case.

But if it were, *primâ facie*, a formidable case, then a considerable part of the oral proof of the Defendants must be false; for where would be the risk of meeting in a Court of Justice a claim of this nature, raised by a profligate woman, living an abandoned life in the house of her keeper, intriguing with his menial servants to his knowledge, and threatened by him for it with expulsion; bearing a child to one of his menial servants, and confessing to several her shame and the real paternity; never married, nor so reputed to be, and her child never even reputed to be the son of her Master, notoriously and by his own confession impotent at the time of its conception, before, and continually after? If such a woman should have had the strange audacity to prefer so desperate a case before a Court of Justice, who would be found to espouse it?

The fabrication of the documents, then, supposes a formidable case at least, and a great part of the oral evidence presents one hopeless and desperate. A Native, even with an honest case, or his advisers, may fabricate evidence to meet a case which they fear, though they know it to be groundless; and if this woman and her child stood in an ambiguous relation to the deceased, and the real heir feared that a Court would draw in favour of marriage and legitimacy really groundless conclusions, from a plausible appearance of marriage and legitimization, the fabrication might, however wicked, not be fatal to a defence; but in this case the Defendant's oral evidence presents a desperate and hopeless case as the real case of the Claimants. If, then, the fabrication be established, proof of that fabrication supports the Plaintiff's case to some extent; for it lays a foundation for

1867.
 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

1867.
 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

and supports the evidence of those apparently respectable witnesses for the Plaintiff, who say that the deceased treated *Denomoney* as his *nicka* wife, so called her, and treated her child, *Fyzoollah*, as his own; and these acts would suffice to prove both marriage and legitimacy, even if the Court refused to believe, or hesitated to believe, the direct testimony as to the ceremony.

Their Lordships have, therefore, directed their attention, in the first instance, to that part of the judgment in the Court below which treats these documents as fabricated. Their Lordships regret to say that they have no hesitation on this part of the case; that they agree entirely in opinion with the Judge below, who pronounced them forgeries. The *Kaboo-leat*, when it is viewed in conjunction with the evidence which accounts for its being given, destroys itself. *Denomoney* is described on the face of it as the widow of *Rajub*, the man to whom she is said to have been contracted, and for whose dwelling-place she was about to build a house on the ground included in the lease. The recitals of course fall with it. The full recitals in all three of the title of the Defendant explains the motives for their fabrication, and the date of them shows the most incredible degree of inconsistency in the conduct of *Denomoney*, admitting and opposing about the same time the title of her Opponents. The Will also is surrounded with suspicion, which its internal evidence tends to confirm. It sets up a *Kabin*, never produced, and the non-existence of which, if it ever existed, is wholly unaccounted for. This Will is not likely to have been executed by the deceased in favour of his wife with whom he had been at variance. The extract

from the Criminal register shows that such was the case. If her claim under the *Kabin* had been real, it would most probably have been produced as a check upon her husband during their active warfare: she represents her husband as merely her *Surberakar*; and if that were so, he must have been acting fraudulently in mortgaging her property. His management is not interfered with, even after he had, in his lifetime, suffered her trust property to be taken in execution for a debt of his own. This appears from the judgment of the Court in the mortgage suit. Taking all these circumstances together, the Court rightly judged the Will to be fabricated; and the observations of the Judge on the *factum* are most weighty. Turning, then, with this assistance to the examination of the positive testimony, this portion of it, at least, may be trusted, which shows the woman and her child to be the woman cohabited with, at least, and the child of the woman acknowledged and declared to be the legitimate child of the father; and this acknowledgment made in words which import a precedent *nicka* marriage. There appears to their Lordships to be no ground for distrusting the evidence, on which the Judge below relies, of the witnesses, *Surenloollah* and *Juggonath Gooho*, who, though they were not present at the *nicka*, nevertheless both speak to acknowledgment of parentage and acknowledgment of *nicka*. Without going the length of saying that the acknowledgment of a son as legitimate who might be a legitimate son of his acknowledger necessarily in all cases raises its mother to the *status* of a wife—a point which it is not necessary to discuss—it is clear that such an acknowledgment as the present, which acknowledges the

1867.

WISE

v.

SUNDULOO.

NISSA

CHOWD-

RANER.

1867.
 WISE
 v.
 SUNDULOO-
 NISSA
 CHOWD-
 RANEE.

mother as wife, involves that consequence. Their Lordships, therefore, cannot find, on a careful consideration of the evidence, and of the reasons given by the Judge in the Civil Court, in his finding on the facts, any sufficient reason for reversing his decision. His judgment seems to be founded on facts fairly inferrible from the evidence, and sufficient under Mahomedan law to confer on the child the *status* of legitimate son, and on its mother, to whom the declaration extends, that of a lawful wife. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decision appealed from, and to confirm the decision of the Principal *Sudder Ameen*, with the costs of the appeal in the *Sudder Court*. The Respondents must also pay the costs of this appeal.

MUSSUMAT JARIUT-OOL-BUTOOL, *alias* } *Appellant,*
 HOSEIN BUKSH ... }

AND

MUSSUMAT HOSEINEE BEGUM ... *Respondent.**

*On appeal from the Sudder Dewanny Adawlut,
 North-Western Provinces.*

5th & 6th
 Feb., 1867.

Upon a question of fact depending on the effect to be given to parol evidence, and the credit due to witnesses, where the

THE appeal in this case was brought against a decree of the late *Sudder Dewanny Adawlut* at *Agra*, which affirmed a decree of the Civil Court of

* Present :—Members of the *Judicial Committee*,—The Right Hon. Sir William Erle, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

Courts in *India* have all concurred in one opinion, the *Judicial Com-*

Zillah Jounpoor, made in a suit in which the Respondent was the Plaintiff, who claimed by right of inheritance to *Mirza Abdoola Begg*, her uncle, and to *Abdoos Sumud Begg*, her husband, both deceased; and the Appellant and others were Defendants, claiming in different rights through *Mirza Abdoola Begg*. By these decrees it was declared, that the Respondent was entitled to the whole of the movable and immovable estate and property left by *Mirza Abdoola Begg*, as his niece and heiress, and also as heiress to *Mirza Abdoos Sumud Begg*, her husband; but that she had failed to prove that the sum of Rs. 25,000, part of *Mirza Abdoola Begg's* property, had been taken possession of by the Appellant at *Mirza Abdoola Begg's* decease. These decrees also declared that the Appellant, who was originally a professional prostitute had failed to prove her asserted marriage with *Mirza Abdoola Begg*; and also that she had failed to establish a Will set up by her as made by *Mirza Abdoola Begg*, dated the day previous to his death; and that she had also failed to prove a deed of relinquishment of right in respect of all future claims to the estate of *Mirza Abdoos Sumud Begg*, alleged to have been executed by the Respondent. These decrees

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

v.

MUSSUMAT
HOSEINEE
BEGUM.

mittee will not disturb the finding, unless it is clearly shown that the Courts below were in error.

The finding of the Courts in *India*—first, that there was not sufficient evidence to establish an alleged Mahomedan marriage; and secondly, that the evidence in support of an alleged Will was unsatisfactory; affirmed on appeal.

A Mahomedan cohabited for many years with a Mahomedan woman who had been a prostitute and who lived in his house. At his death she claimed to be his wife, and called witnesses to prove an actual marriage, but which fact she failed to establish. Held, that the Court of last resort could not presume, in such circumstances, that a woman, once a concubine, had, merely by lapse of time and propriety of conduct, become a wife, and that the ordinary legal presumption was that there had been no marriage.

1867.
 MUSSUMAT
 JARIUT-OOL-
 BUTOOL
 v.
 MUSSUMAT
 HOSEINEE
 BEGUM.

also declared against the asserted claims of all the other Defendants, among whom were, first, one *Ruzee-oon-Nissa*, alias *Rujjee Khanum*, who also set up a marriage with *Mirza Abdoola Begg*; and, secondly, her daughter, *Uzeezool Nissa*, alias *Imamum*, who claimed to be also the legitimate daughter of *Mirza Abdoola Begg*, by the latter. Both of these Defendants denied the alleged marriage and the execution of the Will set up and relied on by the Appellant; and she on her part denied the elder co-Defendant's marriage, and the legitimacy and parentage of her daughter, the younger co-Defendant.

The facts of the case are as follow :—

One *Mirza Ashoor Begg*, deceased, had four sons, named *Mirza Abdool Ehud Begg*, *Mirza Abdool Fuleel Begg*, *Mirza Abdoola Begg*, and *Mirza Abdool Kureem Begg*.

The property in dispute was not claimed as ancestral property derived from *Mirza Ashoor Begg*, but was stated to have been acquired partly by *Mirza Abdool Kureem Begg* and partly by *Mirza Abdoola Begg*. *Mirza Abdool Ehud Begg* and *Mirza Abdool Fuleel Begg* died before their brothers, *Mirza Abdool Kureem Begg* and *Mirza Abdoola Begg*. The former left a son, *Mirza Abdoos Sumud Begg*, and the latter a daughter, *Mussumat Hoseinee Begum*, the present Respondent. *Mirza Abdoos Sumud Begg* and *Mussumat Hoseinee Begum* intermarried after the decease of their respective parents. It was alleged by the Respondent that *Mirza Kureem Begg*, who had no issue, gifted his entire estate to *Mirza Abdoos, Sumud*, and put him in possession. After the decease of *Mirza Abdoos Sumud*, the name of *Mirza Abdoola Begg* was recorded in the Registry in respect

of the estates which had belonged to *Mirza Abdool Kureem Begg* in his lifetime. The Respondent accounted for this fact by stating that she and the other females, owing to living in seclusion, did not apply for mutation of names on the Registry. The Respondent alleged that her possession continued, although her name was not registered, and that, as regarded the estate of *Mirza Kureem Begg*—which was, as she alleged, by virtue of the gift the property of her husband—she was entitled to the entire property. The Respondent admitted that the movable and immovable property, with the exception of the acquired property of *Mirza Abdool Kureem Begg*, was acquired by *Mirza Abdoola Begg*, under whom the Appellant claimed.

On the 2nd of *November*, 1859, *Mirza Abdoola Begg* died childless. At his death an Order was passed by the Civil Court that the property left by him should remain attached until it was ascertained who was entitled to succeed to it. Among other Claimants, the Appellant presented a petition to the Judge in the Civil Court, in which she alleged that the deceased executed a Will in her favour, and had it registered; and that under the terms of the Will, and by right of inheritance, as the widow of the deceased, she was entitled to proprietorship and possession of the entire estate, real and personal, and all other property of the deceased.

The Respondent, by her answer and claim, alleged that the Appellant was a prostitute, and denied that she was *Mirza Abdoola Begg's* lawful wife; and asserted that she (the Respondent) was his lawful heir according to Mahomedan law; and that the Will was a fabricated instrument.

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

v.

MUSSUMAT
HOSEINEE
BEGUM.

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

v.

MUSSUMAT
HOSEINEK
BEGUM.

Rujjee Khanum also presented a petition of claim, denying the Will, alleging it to be fabricated, also denying the marriage of the Appellant with *Mirza Abdoola Begg*, and setting up her own claim as the married and lawful wife of the deceased *Mirza*, and his rightful successor.

Another Claimant, *Imamum*, the daughter of *Rujjee Khanum*, alleged that she was the daughter of the loins of *Mirza Abdoola Begg*, born to him by *Rujjee Khanum*, his lawful wife by marriage; and insisted that, with the exception of one-eighth share of the latter as such wife, the entire estate and property of *Mirza Abdoola Begg* descended to her as his heiress; and also stated that the Appellant was never married to him, and that the Will set up by her as aforesaid was fabricated.

After summary proceedings respecting heirship and the appointment of a Curator, the Respondent brought a suit in the Civil Court of *Jounpoor*, as the widow *Abdoos Sumud Begg*, and as niece and heiress of *Abdoola Begg* against the Appellant, describing her as a courtesan (*Tuwaif*); *Rujjee Khanum* and *Uzee-zool Nissa*, alias *Imamum*, her daughter, describing them also as courtezans; and *Agha Ishmael Ullee Khan* and *Mukhoo Khan* as Defendants. Her title was stated to be founded on a right of inheritance, and to extend to the whole of the movable and immovable estate left by *Abdoos Sumud Begg*, and by *Mirza Abdoola Begg*, her uncle, and she sought to set aside the Will set up by the Appellant, who the Respondent alleged had no rights, and also to render void the claims of all the other Defendants.

The Appellant by her answer set up for the first time a deed of relinquishment, dated the 2nd of Oc-

tober 1846, purporting to have been executed by the Respondent, of the entire property left by her husband, *Abdoos Samud Begg*, in consideration of a salary of Rs. 15 per month, and insisting that thereby the Respondent's claim to the property was barred, as well also by effluxion of time since the death in 1841 of her husband. The answer then alleged that for twenty-two years the Appellant, having left her family profession, and becoming penitent, was lawfully married to *Mirza Abdoola Begg*, with a dower of Rs. 51,000, fixed in consultation with *Moulvee Gholam Yaheer Khan*, *Mooftee* and Principal *Sudder Ameen* of *Benares*, who performed the ceremony of marriage. The answer insisted that her dower was by Mahomedan law a charge on the estate, payable thereout prior to expenses and claims of inheritance, and that, therefore, and under the deed of relinquishment, and also the Will of *Mirza Abdoola Begg*, no one else but herself was entitled to the entire estate of the latter. The alleged Will was stated by the answer to have been made and executed by *Mirza Abdoola Begg* while in his perfect senses, and to have been registered, and to have devised the whole and sole proprietorship and right in his estate to the Appellant, who was therein acknowledged to be his wife; and the answer concluded with a denial of the alleged misappropriation by her of the sum of Rs. 25,000 in cash, as, after *Mirza Abdoola Begg's* death, the property was placed under attachment.

The two other Defendants, *Rujjee Khanum* and her daughter, *Imamum*, filed a joint answer, in which they denied the Plaintiff's right, and alleged that the whole estates were the sole property of *Mirza Abdoola Begg* at his death; asserting that about forty years previously the Defendant, *Rujjee Khanum*, was

1867.
 MUSSUMAT
 JARIUT-OOL-
 BUTOOL
 v.
 MUSSUMAT
 HOSEINEE
 BEGUM.

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

v.
MUSSUMAT
HOSEINEE
BEGUM.

lawfully wedded to him, and lived in his house; that three years after the marriage the co-Defendant was born by her, and was the daughter of *Mirza Abdoola Begg*; that he had subsequently married her to *Syud Usjhur Ulee Khan*; that the Defendant, *Rujjee Khanum*, was supported by and lived with the deceased until his death; and that after deducting a two annas share, as the rights of the Defendant, *Rujjee Khanum*, as widow, the remainder was the property of her daughter. They denied the genuineness of the Will set up by the Appellant.

The Respondent traversed the different allegations as to the marriages, paternity of the daughter, the Will and deed of relinquishment, respectively in the two answers relied on, stating that the Appellant, as well as *Rujjee Khanum*, was a courtesan, and as such, lived in succession with *Mirza Abdoola Begg*, the latter retiring into a separate house and maintaining herself to make way for the former, who succeeded as *Mirza Abdoola Begg's* mistress.

The Respondent examined witnesses to prove her relationship to the deceased *Mirza Abdoola Begg*; the property acquired by her husband, *Abdoo Sumud Begg*, from his uncle *Mirza Abdool Kurreem Begg*; the substitution on his death of the name of *Mirza Abdoola Begg* in the Government Records for convenience and with her consent, as a female living in seclusion unable to transact business; and his subsequent death without leaving any issue or widow, but leaving her his niece as such nearest relative and heiress. Some of these witnesses also deposed that the Appellant had been a prostitute, and had never been married to *Mirza Abdoola Begg*; that the Will and deed of relinquishment set up

by her were fraudulently fabricated at her instance; and that not only the alleged Will was not executed or sealed by the deceased, but that he was in a state of insensibility at the date thereof, and further that the alleged deed of relinquishment was not executed by the Respondent. The Appellant put in evidence the Will of *Mirza Abdoola Begg*, and the deed of agreement, dated the 2nd of *October*, 1846, said to have been executed by the Respondent, and filed depositions of witnesses, taken in the proceedings respecting the administration of *Mirza Abdoola Begg's* estate, to prove the Will; and, further, that she was the lawful wife of *Mirza Abdoola Begg*, regularly married to him, with a dower of Rs. 51,000; that he had repeatedly acknowledged her as his lawful wife; that the deed or Will was made by *Mirza Abdoola Begg* on the 2nd of *November*, 1846, and registered before his death; and that the Respondent had acknowledged the agreement of the 2nd of *October*, 1846, and received an allowance of Rs. 15. It was not satisfactorily shown by the Respondent's witnesses that the Appellant even took the Rs. 25,000 alleged by her from the house of *Mirza Abdoola Begg*.

The hearing of the suit took place before *H. G. Astell*, Esq., the Judge of the Civil Court of *Founpore*, and by the decree of that Court, dated the 30th of *April*, 1861, the evidence given by the Appellant, with reference to her claim as widow, was observed upon as follows:—"With respect to her marriage with the deceased, the Defendant, *Hosein Buksh*, has grounded her proof on the depositions of thirteen witnesses, who were examined by the Judge of *Benares*. Their statements are to the effect that, although *Hosein Buksh* was originally a professional prostitute, and in that character first formed her connection with

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

v.
MUSSUMAT
HOSEINEE
BEGUM.

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

v.
MUSSUMAT
HOSEINEE
BEGUM.

the deceased, that about twenty years ago the deceased regularly married her. Some of these witnesses describe themselves as eye-witnesses to the ceremony, and others deposed to having heard deceased on several occasions acknowledge that he had married her. These depositions, however, have not at all satisfied me that any marriage took place, or that the Defendant, *Hosein Buksh*, was ever looked upon, or considered in the light of a wife, either by the deceased or by the brotherhood. It is remarkable that the persons who are stated to have assisted at the ceremony, *i.e.* those of rank or position, are dead; whilst it cannot but be considered as prejudicial to this plea of the Defendant, that she has considered it necessary to get a Will executed in her favour by the deceased when he was certainly very ill, and very near his death. I am of opinion, that *Hosein Buksh* has no claim as a wife of the deceased." The judgment then dealt at considerable length with the depositions filed by the Appellant in respect of the Will, under which she claimed as sole devisee, and the Judge concluded by finding against the Will, declaring that he rejected it on the oral evidence filed by her in support of it. "This evidence is, I consider, worthless in the extreme, and bears falsehood on its face. The witnesses, with a view of showing that the deceased was sensible to the last, have all stated that the deceased's (*Mirza Abdoola Begg's*) complaint was consumption; but many of them detail at length how, just before the Will was made, the deceased gave long detailed instructions for its preparation, how he called for his spectacles and put them on, and how he was too weak to either sign his name or affix his seal, which was then affixed by another party. I reject this Will *in toto*." The judgment then observed on the evi-

dence in support of the deed of relinquishment, alleged to have been signed by another person for and on behalf of the Respondent, and declared against it, stating that it was the opinion of the Court that the witnesses examined in support of the deed had all perjured themselves. The judgment also declared that the Defendant, *Rujjee Khanum*, had been a prostitute by profession, and had failed in proving that she was ever married to *Mirza Abdoola Begg*, or that her daughter, the Defendant, *Imamum*, was his child. The Respondent's claim of Rs. 25,000 was disallowed by the judgment, which decreed to the Respondent the whole of the property left by the deceased *Mirza Abdoola Begg*, with costs.

The Appellant appealed to the *Sudder Dewanny Adawlut* at *Agra*, and the other two Defendants, *Rujjee Khanum* and her daughter, *Imamum*, also appealed against the decree.

On the 23rd of *August*, 1862, the two appeals were heard together, by *Alexander Ross* and *William Roberts*, Esqrs., Judges of the *Sudder Dewanny Adawlut*, and they delivered the judgment and decree of the Court, and stated at length their reasons, thereby affirming the decree of the Judge of the Civil Court of *Jounpoor*, and dismissed both the appeals with costs. In their judgment the Judges commented on the proofs filed by the Appellant as follows:—
“We would observe *in limine* that a great deal of the evidence of witnesses taken in a miscellaneous case relative to the party entitled to administer to the estates of the deceased *Mirza Abdoola Begg*, has been received in this case, without the examination of these witnesses *de novo*. But we think the Judge should not have contented himself with copies of depositions, but should have insisted on the parties

1867.

MUSSUMAT
JARIUT-OOOL-
BUTOOL

v.
MUSSUMAT
HOSEINEE
BEGUM.

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

v.
MUSSUMAT
HOSEINEE
BEGUM.

formerly examined being again produced, unless it could be shown that they were unable to attend. It was necessary that these witnesses should again have been subjected to a rigid examination, so that all the light which could have been thrown upon the circumstances of the deceased should have been brought to bear on this suit. Still, as the inadmissibility of such secondary evidence was not urged in the Lower Court, we have thought proper to allow it to weigh in this instance, *valeat quantum*. The decree declared, as well on the last-mentioned evidence as on the other evidence in the appeals, against the Appellant and her co-Defendants on each of the issues, negating the alleged two marriages respectively, the alleged Will of *Mirza Abdoola Begg*, the alleged deed of relinquishment of the Respondent, and the paternity of the Defendant, *Imamum*.

The appeal was brought by the Appellant alone from this decree of affirmance.

The Attorney-General (Sir *John Rolt*, Q.C.), and Mr. *Almuric Rumsey*, for the Appellant.

The evidence given by the witnesses establishes, according to the Mahomedan law, the ceremonies of a regular marriage between the Appellant and the late *Mirza Abdoola Begg*, and consequently her title as widow and one of his heirs to the whole or part of his estate. Too much weight was attached by the Courts below to the irregular life the Appellant had led previous to being taken into *Mirza Abdoola Begg's* house. His treatment of her, and her acknowledged character as a wife by the family, was enough to satisfy the requirements of the Mahomedan law, even in the absence of proof of a regular marriage, to raise the presumption that she was married to him.

By the Mahomedan law marriage will be presumed or inferred from cohabitation. It differs from the Scotch law of marriage by habit and repute; *Bell's Dict.*, *voce* "Habit and repute," p. 459 [Ed. 1838]; *Erskine*, B. I. tit. 6, s. 6; as the latter law presumes a pre-existing contract, but no contract or ceremony is necessary by the Mahomedan law (a). Marriage has been presumed from cohabitation alone, and legitimacy of child arising from that presumption established: *Mahomed Bauker Hoossian Khan v. Shurfoon Nissa Begum* (b); *Khajah Hidayut Oollah v. Rai Jan Khanum* (c); *Macnaghten's Princ. of "Moohummudan Law,"* p. 58. There can exist no distinction between cases of marriage where there is no child born and the principles with respect to presumption of marriage and legitimacy of child laid down in those authorities. [Sir RICHARD T. KINDERSLEY: Is there any case of a woman who had been a Nautch girl, or prostitute, having from cohabitation been held to be a wife?] It is admitted that the *status* of a concubine and the *status* of a wife are different; but if for a long period a concubine is treated as a wife and so acknowledged, she acquires the *status* of a wife. The strictness of seclusion generally adopted by a Mahomedan wife is not adopted in every case.

Next, we contend, that the deed or Will of *Mirza Abdoola Begg*, dated the 2nd of *November*, 1859, was proved to have been duly executed by him when he was of testamentary capacity, registered on the same day, and operated either as a gift, *inter vivos*, or

(a) See Baillie's Dig. of Mooh. Law, p. 4 [Ed. 1865], from which it appears that offer and acceptance is a necessary condition.

(b) 8 Moore's Ind. App. Cases, 136.

(c) 3 Moore's Ind. App. Cases 295.

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

v.
MUSSUMAT
HOSEINEE
BEGUM.

1867.
 MUSSUMAT
 JARIUT-OOL-
 BUTOOL
 v.
 MUSSUMAT
 HOSEINEE
 BEGUM.

as a general devise or bequest, to the extent allowed by Mahomedan law, namely, of one third: *Hedaya*: Vol. 4, p. 468-9; *Mussumaut Soobhanee v. Bhetun* (a). It bears internal evidence of truth. The consent of kindred to a Will does not extend to distinct kindred like the Respondent. Apart from any question as to the validity of this instrument, the Appellant is entitled to her dower of Rs. 51,000 as a primary charge on the estate of her late husband.

In any circumstances, the Respondent, as widow of *Mirza Abdoos Sumud Begg*, could be entitled only to a distributive share of his estate. There is no proof that she was the adopted daughter of *Mirza Abdoola Begg*, and her only claim could be as one of his distant kindred. She can have no title whatever as long as any sharer is in existence. *Macnaghten's* "Princ. of Moohummudan Law," pp. 8, 53.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Respondent, were not called on to address their Lordships.

Their Lordships' judgment was delivered by

The Right Hon. Sir JAMES W. COLVILE :

24th Feb.,
 1867.

This is an appeal from a decision of the late *Sudder Dewanny Adawlut* of the North-western Provinces of *India*, which affirmed a decision of the local Court of *Founpoor* in favour of the Respondent, the Plaintiff in the suit. The Plaintiff sought to recover certain movable and immovable property specified in her plaint "by right of inheritance to *Mirza Abdoola Begg*, her uncle and ancestor, and also to *Mirza Sumud Begg*, her husband." The plaint con-

(a) 1 Ben. Sud. Dew. Rep. 347.

tained a detailed description of the property sought to be recovered. The principal Defendants were *Mussumat Hosein Buksh*, *Mussumat Ruzzee-ool-Nissa*, alias *Rujjee Khanum*, and *Mussumat Uzeez-col-Nissa*, alias *Mussumat Imamum*.

The first and second-named female Defendants claimed each to be a widow of the deceased *Abdoola*, but each denied that the other was ever married to *Abdoola*, each alleging the other to have been his mistress and not his wife. The third female Defendant claimed to be the legitimate daughter of *Abdoola* by his alleged wife, her mother, the second female Defendant. The first female Defendant, the present Appellant, also set up a Will alleged to have been made in her favour by *Abdoola* the day before his death, by which he bequeathed to her, by the description of "my married wife, *Mussumat Fairut-ool-Butool*, alias *Bebee Hosein Buksh*," all his movable and immovable property, subject to certain provisions in favour of the Plaintiff, to which it is not necessary to allude further. The validity of this Will was disputed both by the Plaintiff and by the second and third Defendants. The Civil Court decided against the Will, and also against both the alleged marriages, and the alleged title of the third female Defendant. On appeal to the *Sudder Dewanny Adawlut* the decision was affirmed. The first female Defendant alone has appealed to Her Majesty in Council from the decision of the *Sudder Dewanny Adawlut*. The second and third Defendants have not appealed, and, therefore, their interests are put out of the case entirely.

In the case of *Naragunty Lutchmeedavamah v. Vengama Naidoo* (9 Moore's Ind. App. Cases, 87),

1867.

MUSSUMAT
JARIUT-OO-
BUTOOL

v.

MUSSUMAT
HOSEINEE
BEGUM.

1867.
 MUSSUMAT
 JARIUT-OOL-
 BUTOOL
 v.
 MUSSUMAT
 HOSEINEE
 BEGUM.

their Lordships said: "It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of *India* merely on the effect of evidence, or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion, it must be shown very clearly that they were in error in order to induce us to alter their judgment."

Their Lordships, after a very careful attention to the evidence, and to the arguments addressed to them on the part of the Appellants, are of opinion, that there is wanting in this case that clear indication of error in finding against the marriage and the Will which would be necessary to take this appeal out of the operation of the above salutary rule.

The *Sudder* Court thought the evidence as to the marriage of the Appellant insufficient. The same Court concurred with the Court below in thinking the evidence in support of the Will untrustworthy. They say, "We concur with the Judge in discrediting the evidence in support of the Will. We consider the attendant circumstances as altogether improbable and unworthy of belief."

Is error clearly manifest in these conclusions? Is the evidence clearly sufficient to prove either issue? The claim to be declared the wife of the deceased would establish, on oral testimony, a heavy charge on the estate of a deceased person to the amount of Rs. 51,000, and the Will is one made *in articulo mortis*. Some of their Lordships can judge, by their experience of precedent cases before this Committee, of the dangers likely to ensue if the Courts of

Justice in *India* did not require cogent proof in such cases.

If it were once conceded that a woman once a concubine could be converted by judicial presumptions into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, when and after what period of time should such presumption arise? The ordinary legal presumption is, that things remain in their original state. Were, then, the Courts below well founded in treating the original connection by the Appellant with the deceased *Abdoola* as an illicit connection? The evidence was conflicting. She herself admits that she was once a prostitute. It is true that she alleges penitence and a change of life, and some of her witnesses say that she had relinquished the life of a prostitute before her intercourse with *Abdoola* began; and one witness says that she had discontinued it five years before she came to live with *Abdoola*. But no evidence is adduced to prove what was her intermediate employment, or what were her means of maintaining herself in the interim. She declares the deceased to have been a man entertaining one mistress whilst his wife was living. The Court had to determine amidst conflicting evidence, whether it was more likely that he should make a woman of that class his wife, and settle on her a very large dower, or that he should induce her to live with him as his mistress, displacing the former favourite? The evidence was conflicting, and the finding cannot be viewed as a decision against the weight of evidence. If, then, the Courts below were justified in finding that the original connection was illicit, where is the evidence of any change in its

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

7.
MUSSUMAT
HOSEINEE
BEGUM.

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

v.

MUSSUMAT
HOSEINEE
BEGUM.

character? If length of time be invoked as a reason for considering the previous connection as lawful, the Appellant herself is found placing no reliance on mere length of intercourse with respect to the second Defendant's claim to be regarded as a wife: and if the subsequent removal to a different house of that lady be insisted on as an argument that she was not a wife, the answer seems to be that the mere removal into and maintenance in a separate house is not at all inconsistent with the *status* of a regularly married wife, superseded either by wife or concubine, but undivorced. The Appellant, indeed, is not content to rely on any presumption from length of time; she alleges and calls witnesses to prove an actual marriage ceremony, accompanied with some degree of publicity, the presence of witnesses, and the oral assignment of a large sum by way of dower.

The witness, *Iman Buksh*, the Physician, deposes to this effect, that only one year before the death of *Abdoolla*, the latter assured him that the Appellant was his wife; that the witness asked the question in consequence of the Appellant referring him to the deceased for information on the point, asserting that she was a wife, and that the second Defendant was not, and that the *Mirza* would so inform him. Now, this witness describes himself as having attended both on the *Mirza* and on the Appellant, not as a mere stranger in the house. But what origin can reasonably be ascribed to this inquiry as to her *status*, unless some ambiguity existed in relation to it; and how is this ambiguity consistent with a marriage celebrated from the first before witnesses, with an outspoken assignment of a large dower in the husband's house? Can any ignorance or uncertainty

about such a *status* exist at all in the house of the husband, with such an introduction of a new wife, and such an open celebration of a marriage? The evidence, therefore, does not cohere, and the Court might well distrust it; nor could their distrust be reasonably found fault with in a case where each alleged wife brought forward the same kind of evidence of an open celebration, and each treated as undeserving of credit the allegations and evidence of the other.

With respect to the Will, the improbabilities against it are strong, and the evidence in its favour weak. It is deposed that the second female Defendant was present during the time that the Will was being dictated, rough copied and clean copied; that a provision was made in the Will for her expenses in case she proceeded on a pilgrimage to *Mecca*, and that this was done on her request. She is, therefore, described as cognizant of the Will, and assenting to it in some degree by accepting a contingent benefit under it. Yet she was united with her daughter and son-in-law in interest, and throughout acted in conjunction with them. She claimed to be a wife, and sought to establish her daughter as an heir. Her assent to the Will is, therefore, most improbable, and the supposition is rendered more so by this, viz., that at this very time her son-in-law, *Usghur*, was making a public protest by way of petition addressed to a public Officer, claiming his interference and presence at the house of *Abdoolla*, to prevent a Will being executed in the name, as he alleges, of *Abdoolla*, then a senseless and dying man. Is the second alleged wife to be supposed acting at variance with herself without adequate

1867.
 MUSSUMAT
 JARIUT-OOL-
 BUTOOL
 v.
 MUSSUMAT
 HOSEINEE
 BEGUM.

1867.

MUSSUMAT
JARIUT-OOL-
BUTOOL

v.

MUSSUMAT
HOSEINEE
BEGUM.

motive, and in so short a period of time to return to opposition? It appears that she had two years before protested against a description of herself as "prostitute" on a public assessment, and had been described as wife on her own application on more than one public document. She was, therefore, claiming to be a wife. The reason for describing her as present and acquiescent at the time of the preparation of the Will is obvious. That a Mahomedan of high position and wealthy, a man of business besides, should, with a view to prevent disputes in his family, make such a Will, as likely to foment as to quell them, and omit to make that disposition which would, had her story been true, secure to the Appellant her dowry of Rs. 51,000 and her share as widow, is not a probable occurrence in itself. One would expect him to act with the advice and aid of his usual *Mooktah*, and not defer the settlement of disputes in the confused state of his family connections until his last hours, and then to put himself in the hands of people not previously employed by him; on the other hand, if a Will, whether from fraudulent or merely mistaken prudential motives, was to be put forth, though without his concurrence, as his, the preparation and execution would be delayed until his end was so near, his strength so reduced, and his mind so inert, that he would probably be found incapable of opposition to a proposition pressed upon him. Between these conflicting views of the subject the Courts below were called on to decide, and their conclusion does not appear to their Lordships unreasonable or against the weight of evidence.

Their Lordships think, therefore, on a careful view of the evidence, that the case is not taken out

of the operation of the rule laid down in *Naragunty Lutchmeedavamah v. Vengama Naidoo* (9 Moore's Ind. App. Cases, p. 87), which has been frequently asserted and constantly acted on. Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed, with costs.

1867.
 MUSSUMAT
 JARIUT-OOL-
 BUTOOL
 v.
 MUSSUMAT
 HOSEINEE
 BEGUM.

MEETHUN BEBEE ... Appellant,

AND

BUSHEER KHAN for self, and as guar-
 dian of ZURBUT BEBEE, minor, and
 heir of MONEER KHAN, deceased,
 and BUKHT BANOO ... } Respondents.*

*On appeal from the High Court of Judicature in
 Bengal.*

THE Respondents brought the present suit in the Court of the Principal *Sudder Ameen* of the *Zillah* of *Cuttack*, against the Appellant.

9th Feb.
 1867.

Where the issue is one of facts only, and there has been concurrent judgments by the Courts in *India*, the Judicial Committee will not disturb such findings, unless they are satisfied that the Courts below were wrong in the conclu-

The suit was in the nature of an action of ejectment, to oust the Appellant from possession of a certain *Zemindary*, land and houses situate at *Cuttack*, and to obtain possession of personal property, cash and jewels. The Respondents claimed the same as

° Present:—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor:—The Right Hon. Sir Lawrence Peel.

sions they arrived at from the evidence.

1867.
 MEETHUN
 BEBEE
 v.
 BUSHEER
 KHAN.

the nearest relations and only heirs, according to the Mahomedan law of one *Agha Jan Khan* deceased; and that the property in question was, in its entirety, the absolute self-acquired property of *Agha Jan Khan*. The case of the Appellant, the widow of *Agha Jan Khan*, was that the Respondents had failed to prove, either that they were such relatives, or that the proprietary right in the entirety vested in *Agha Jan Khan*, and she contended that the estates were acquired by her father, *Burkhordar Khan*, and by the use in trade and business of the property and effects of one *Omar Khan*, her first husband, and her son, *Timour Khan*, deceased, to which, with its accumulations, the Appellant, as widow and mother, was alone entitled, after the claim of *Ismail Khan*, uncle and heir of the latter; and she further insisted that, even if *Agha Jan Khan* could have claimed any share, by reason of his carrying on business and trade for her, at his death she became, as his widow, entitled to such share, and to the sum of Rs. 20,000, the amount of her *Dain mohr*, or dower, settled on her marriage with *Agha Jan Khan*.

The case entirely depended upon evidence. The material facts are stated in the judgment.

The decree of *Baboo Tarakant Biddyasager*, the Principal *Sudder Ameen*, was partly in favour of the Respondents, and partly in favour of the Appellant, the Court decreeing certain shares to each of the parties in the real and personal estate in question; with this decision both parties were dissatisfied, and appealed to the High Court of Judicature at *Calcutta*. That Court, consisting of *H. T. Raikes*, Esq., and *Sum-bhoonath*, *Pundit*, allowed the appeal of the Respondents, and altered the decree of the Principal *Sudder Ameen*, by giving them a larger share in the real

and personal estate of *Agha Jan Khan*, and dismissed the Appellant's appeal. Hence the present appeal to Her Majesty in Council.

The appeal was argued by

Mr. *Leith*, for the Appellant, and

Mr. *Pontifex*, for the Respondents.

Judgment was reserved, and delivered by

The Right Hon. Sir JAMES W. COLVILE :

The Appellant is the widow of *Agha Jan Khan*, a native of *Cabool*, who died domiciled at *Cuttack* in July, 1857. Her father was one *Burkhordar Khan*, also probably a *Pathan* by origin, who, after carrying on some kind of business at *Cuttack*, is said to have gone into the *Dekhan* with elephants, horses, and other merchandise, and to have died there in the early part of the present century. He left a widow, *Fatima*; the Appellant, his only daughter; and a son named *Hossein Khan*. The Appellant married first an Afghan named *Omar Khan*, who died some time in the year 1824; and very shortly after his death she married his near relation, *Agha Jan Khan*. By *Omar Khan* she had a son, *Timour Khan*, who died in 1829. In the year 1831 there appeared at *Cuttack* one *Ismail Khan*, who claimed to be the brother of *Omar Khan*, and, as such, entitled to share in that portion of his estate which had descended to his son *Timour Khan*. *Agha Jan Khan* and the Appellant compromised this claim for a sum of Rs. 300, and the release of a debt of Rs. 721. After that transaction *Agha Jan Khan* carried on business at *Cuttack*, became the registered and ostensible proprietor of the

1867.
MEETHUN
BEBEE
v.
BUSHEER
KHAN.

8th March,
1867.

1867.
 MEETHUN
 BEBEE
 71.
 BUSHEER
 KHAN.

Zemindary Talook, which is the principal subject of dispute in this cause, and the apparent owner of the other property which the Courts below have found to have belonged to him at the time of his death.

The Respondents claim to be the co-sharers and residuaries, who, according to the Mahomedan law, are entitled to divide the estate of *Agha Jan Khan* with his widow. They contend that *Koollee Khan*, the common ancestor, had two sons, of whom *Morad Khan* was the father of *Agha Jan Khan*, and of the female Respondent, *Bukht Banoo*; and the other, *Nidda Khan*, was the father of the before-mentioned *Omar Khan* and *Ismail Khan*; and that *Ismail Khan* was the father of the Respondents, *Busheer Khan* and *Moneer Khan*, and of one *Goolmer Khan*, who is dead. Claiming under this title, they instituted the present suit for the recovery of their respective shares of the *Zemindary* and other property alleged to have belonged to *Agha Jan Khan* at the time of his death from his widow, who was in possession of it.

The Appellant has contested their title to sue; she has claimed the sum of Rs. 20,000 as due to her from the estate of *Agha Jan Khan* as the stipulated amount of her *Dain mohr*, and, on the grounds which will be hereafter considered, has denied that any part of the property claimed belonged to her late husband. The first two questions may be very shortly disposed of.

Their Lordships, in the course of the argument, intimated that they considered the title of the Respondents to be established.

It has been affirmed by the concurrent judgment of the two Courts below, which, the issue being one of fact, their Lordships, according to the ordinary

course of this Committee, would not disturb unless they were satisfied that it was wrong. They believe, however, that it was right. It was, no doubt, difficult for the Appellant to disprove the pedigree of a family whose domicile was in Afghanistan; and the omission of *Ismail Khan* to mention in the petition, which is in evidence, his relationship to *Agha Jan Khan*, may be a circumstance of suspicion. But it was not necessary for him to state that relationship in order to make out the title, which he was then asserting, as co-heir of *Omar Khan's* son; and on the other hand, we have indisputable evidence that *Agha Jan Khan* received into his family, and recognized as kinsmen, first, *Goolmer Khan*, and afterwards the Respondent, *Moneer Khan*. The identity of that *Goolmer Khan* with the *Goolmer Khan* of the pedigree might be disputed; but there can be no doubt as to the identity of *Moneer Khan*. The persons, therefore, who are entitled to share the estate of *Agha Jan Khan* have been correctly ascertained. Again, both the Courts below have held that the Appellant has failed to establish her claim to the *Dain mohr*; and nothing has been urged on the present appeal which induces their Lordships to doubt the correctness of that conclusion. Therefore the only substantial question in this appeal is, to what extent, if any, is the property which is the subject of the decrees in the Courts below to be treated as the estate of *Agha Jan Khan*.

The Respondents, relying mainly on the ostensible ownership, insist that the whole of it is to be so treated. The case of the Appellant is, that no part of it, in fact, belonged to her husband; that it was acquired from the proceeds of a business carried on with funds left by her father, *Burkhordar Khan*;

1867.
MEETHUN
BEBER
v.
BUSHEER
KHAN.

1867.
 MEETHUN
 BEBER
 7.
 BUSHEER
 KHAN.

that those funds and that business belonged to herself, her mother, and her brother, as the co-heirs of *Burkhordar Khan*; and that her late husband, though the "*gerent*" of the business, and the ostensible purchaser and registered holder of the *Talook*, was a mere Manager and Trustee for her and her family.

Of the issues recorded in the suit by the Court of First Instance, the second and the fourth both related to this question of title to the property. Under the first of these, the Respondents had to prove that "the whole of the disputed property was the own property of *Agha Jan Khan*." Under the other, the Appellant had to establish that "the *Zemindary* and other property claimed had been inherited by her from her father's, mother's, and brother's estate, and belonged to her; and that *Agha Jan Khan* had no right thereto."

Both the Courts below have held, and in their Lordships' opinion properly held, that the Appellant has failed to prove this last issue, and to substantiate the case set up by her. She relied mainly on the oral testimony of witnesses whom both Courts have pronounced to be untrustworthy. Of their evidence, some part was directed to prove the wealth of *Burkhordar Khan* and of his family, and the poverty of both the husbands of the Appellant and of their family; other parts went to show that the *Zemindary* was purchased with funds supplied by *Fatima*, and even that she was recognized as *Zemindar*, and received the rents. There is a failure of proof that the property of *Burkhordar Khan* (and it is very uncertain what was the amount of it) furnished the capital on which *Agha Jan Khan* traded; there is no proof that the business carried on by *Burkhordar*

Khan was an established, continuing business. His dealing in horses and elephants seems to have been something distinct and of a different nature from the money-lending business, in which, as some of the witnesses state, his widow engaged after his death. And, lastly, the case set up by the Appellant, and sought to be established by her witnesses, is inconsistent with her acts and conduct. For, though *Fatima* pre-deceased *Agha Jan Khan*, *Hossein Khan* is stated by some of the Appellant's witnesses to have survived him, and appears, by the Appellant's written statement, to have left a daughter. Yet, on the death of her husband, the Appellant claimed to be entitled to the whole of the property; and procured, by petition to the Collector, the registration of the *Talook* in her sole name. No suggestion that either *Hossein Khan* or his daughter had any interest in the property was then made.

It may be said, on the other hand, and probably with truth, that the oral testimony adduced by the Respondents is hardly more trustworthy than that on the part of the Appellant. Such as it is, it is directed to prove the poverty of *Fatima* and her family; and that *Agha Jan Khan*, at the date of his marriage, had some, though not very ample, means. The Respondents are, however, entitled to rely on the presumption resulting from his ostensible ownership of the property, until that is satisfactorily rebutted. There is documentary evidence in the cause which shows that other real property was bought and sold by him. Some of the proceedings which are in evidence, and the fact of his taking into the house first one cousin and then another, tend to the conclusion that he was the master of his family, and head of his

1867.
 MEETHUN
 BEBEE
 v.
 BUSHEER
 KHAN.

1867.
MEETHUN
BEBEE
v.
BUSHEER
KHAN.

own house. It is not likely that he, who was obviously the active man of business of the family, would have submitted to occupy for thirty years the dependent position which the Appellant's case assigns to him. Nor is there any strong antecedent improbability in the hypothesis that by means of successful traffic during that period he had been able to realize, from however small beginnings, the property of which he died ostensibly possessed. Therefore, of the two cases set up by the parties, the weight of evidence seems to be in favour of that of the Respondents.

But between these two cases lies the theory adopted by the Principal *Sudder Ameen*. That intermediate theory is that the property was acquired from the proceeds of a trade carried on by the Appellant and her husband in partnership, the original capital of the Appellant being derived, not from her own family, but from the estate of her first husband, *Omar Khan*; and that the shares of the parties in this joint concern, being undisclosed, must be assumed to have been equal.

If this case had been established by satisfactory evidence, the Principal *Sudder Ameen*, in dealing with the second issue, might properly have adopted and acted upon it. It appears, however, to their Lordships, as it appeared to the High Court of *Calcutta*, not to be so established. The theory of a partnership, properly so called, between the Appellant and her husband, is not only inconsistent with her case as first launched, but has been indignantly repudiated by her throughout the proceedings in the suit, and particularly by her petition of appeal to the High Court. None of the witnesses attempt to prove

it. There is, no doubt, some evidence of partnership dealings between *Omar Khan* and *Agha Jan Khan*. But that evidence points rather to some joint adventures, than to a regular partnership in a continuing and established business. Again, there is evidence that *Omar Khan* died worth some few thousand rupees. The sum at which the residue of his estate is estimated in the petitions of *Ismail Khan* is less than Rs. 4,000. But, as Mr. *Pontifex* argued, there is no proof that this sum, or any other property of the Appellant, entered into the capital on which *Agha Jan Khan* traded. Had that been her case, she might have proved it by the Books of the business, which are presumably in her power and custody, the evidence of *Gomashtahs*, or the like. If the Principal *Sudder Ameen* thought that his hypothesis was according to the truth of the case, and the real rights of the parties, he should have established it by pursuing the inquiry, and by calling for the production of proper proof. *Meer Dowlut's* testimony falls very far short of such proof. And the conclusion of the Principal *Sudder Ameen* as to the partnership seems to rest principally on his own knowledge and belief, or public rumour—grounds upon which no Judge is justified in acting.

Their Lordships are, therefore, of opinion, that upon the facts alleged and proved in this case the judgment of the High Court, which, varying the decree of the Principal *Sudder Ameen*, dealt with the property in dispute as wholly that of *Agha Jan Khan*, is right. They feel, however, considerable doubt whether that judgment, partly owing to the nature of the suit, and partly to the very unsatisfactory manner in which it has been conducted, has not

1867.
MEETHUN
BEBEE
v.
BUSHEER
KHAN.

1867.

MEETHUN
BEBEE
v.
BUSHEER
KHAN.

failed to do complete justice between the parties. The suit is not an administration suit, in which the assets of the deceased, and the charges and incumbrances thereon in the shape of debts or otherwise, are ascertained by proper inquiry. It is a suit for the recovery of certain shares in specified property assumed to have belonged to the deceased. Again, the excessive claim of the Appellant may have prevented her from getting that to which she is really entitled. Her own property may have been mixed up with her husband's. Their Lordships do not feel at liberty to re-open the litigation in this suit. But whilst they humbly recommend Her Majesty to dismiss this appeal with costs, they will add a recommendation that the Order be without prejudice to any proceedings on the part of the Appellant to establish any debt, other than her claim for *Dain mohr*, against her husband's estate, or any lien, in respect of such debt, upon that estate.

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

JUGGOMOHUN BUKSHEE ... *Appellant,*

AND

ROY MOTHLOORANATH CHOWDRY, ROY
KISTONATH CHOWDRY, and ROY } *Respondents.**
PREONATH CHOWDRY ...

On appeal from the Sudder Dewanny Adawlut of Bengal.

IN this case, the suit was brought by the Appellant to recover possession, with mesne profits, of *Ryotee* land and buildings, described as holdings, Nos. 28, 31, and 39, situate in *Mouzah Baliaghatta Deehee*

8th Feb.,
1867.

Ben. Reg.
XI. of 1796,
sec. 4, pro-
vides that,
after taking
certain speci-
fied proceed-
ings, the Ma-
gistrate is to
order the
attachment of
any land or

Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kin-
dersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

other real property, held by a person charged with a criminal offence, who may evade the Magistrate's process by flight or concealment; by requiring the Collector, if the absentee be a proprietor of land or a *Sudder Farmer*, paying revenue immediately to Government, to hold the

1867.
JUGGOMOHUN
BUKSHEE
v.
ROY MOTHOO-
RANATH
CHOWDRY.

Punchannogram in the *Zillah* Twenty-four *Pergun-
nahs*, and to obtain the reversal of a Magistrate's
Order of possession under Act, No. IV. of 1840,
made in favour of one *Gopeemohun Mitter*, under a
sub-lease by the registered lessee and the Respondents.

The facts of the case were as follows:—

In the year 1841, one *Roy Bykantnath Chowdry*,
since deceased, the elder brother of the Respondents,
entered into a settlement with Government for a lease,
subject to the payment of the Government revenue
assessed thereon, of the holdings, Nos. 28, 31, 39,
with other lands; and obtained a *Pottah* thereof
from Government in his sole name; and he was
registered in the Collector's records as sole proprietor
thereof, and so continued sole registered proprietor
up to the time of the attachment and confiscation by
Government of the lands in question.

It appeared that in the year 1854, *Roy Bykantnath*

land or farm in attachment until further notice, and prescribes the
measures to be taken by the Collector. Section 6 enacts, that "Should
the absentee neglect to attend for a period of six months after the lands
have been ordered under attachment, the Magistrate is to report the
case to the Governor-General in Council, who will pass such order upon
it, and upon the future disposal of the lands, as he may judge proper."

A. held a *Sudder* farm, part of Government *Khas Mehals*, paying
revenue directly to Government. Although *A.* was the sole registered
tenant, yet he was a member of a joint undivided Hindoo family. *A.*
having been charged with a criminal offence, absconded in order to avoid
the process of the *Foujdary* Court, when the Governor-General, under
the provisions of *Ben. Reg. XI.* of 1796, confiscated the lands, and after-
wards sold them by auction: Held—

First, that as the Regulation is highly penal, it must be strictly con-
strued, and in the absence of any express provision for the case of joint
proprietors of land, or persons jointly holding a *Sudder* farm, it could
not be assumed that the Legislature intended to authorize the confiscation
of any other property than the share of the absconding absentee.

Secondly, that it was not competent to the Government, under that
Regulation, in the circumstances of the property being held by members
of a joint undivided Hindoo family, to sell more than the fractional
share and interest of the delinquent absentee, and that the fact of the
lands being registered in the sole name of *A.* made no difference.

Thirdly, that a sale under Regulation *XI.* of 1796, does not carry with
it the consequences of a sale for arrears of public revenue, by sweeping
away all sub-tenures or incumbrances made by the defaulter.

Chowdry, being charged in the *Foujdary* Court with wounding one *Jaffray*, resisted the process and orders of that Court, and finally absconded to avoid the jurisdiction of the Court and legal consequences of his acts. The result was, that, on the 3rd of *September*, 1854, the above holdings, with other immovable property held in the name of *Roy Bykantnath Chowdry*, were attached by the Collector of the District, and confiscated by the order of Government. Afterwards, on the 21st of *March*, 1855, a sale was ordered by Government of these lands, and a public notice of the intended sale published by the Collector. The Respondents presented a petition to the Collector, in which they claimed to be entitled to a beneficial interest in the whole of the lands, alleging that they jointly enjoyed the rents derived therefrom with *Roy Bykantnath Chowdry*, as brothers and members of the same joint family, and praying that the share or interest of *Roy Bykantnath Chowdry* might be alone sold.

This petition was rejected by the Collector, and on the 27th of *April*, 1855, the holdings, Nos. 28, 31, 39, with the other lands, were put up to public auction by the Collector, and were described as having been, up to the time of confiscation, the sole property of *Roy Bykantnath Chowdry*, and sold, subject only to the payment of the Government revenue assessed thereon, to one *Thakoordos Bannerjee*, as the highest bidder, for the sum of Rs. 4,690; and Bills of sale of the same were accordingly executed on the 9th of *May*, 1855, by the Collector, in favour of the purchaser, who directed possession to be given to him.

The Respondents presented a petition to the Commissioner of Revenue by way of appeal from the

1867.

JUGGOMOHUN
BUKSHEE

v.

ROYMOTHOO-
RANATH
CHOWDRY.

1867.

JUGGOMOHUN
BUKSHEE
v.
ROYMOTHOO-
KANATH
CHOWDRY.

Order of the Collector, and alleged that the same was irregular, inasmuch as the entirety of the lands had been sold instead of the right and interest alone of *Roy Bykantnath Chowdry* therein, and that certain notices alleged to be required under *Ben. Reg. VII. of 1825* had not been served; and prayed that the Petitioners' rights might be saved, and the interest of *Roy Bykantnath Chowdry* alone sold by sending notice of the sale again. The Commissioner affirmed the Order of the Collector, and declared the legality of the sale of the entire property, which he thereby confirmed. The Respondents appealed to the *Sudder* Board of Revenue against the decision of the Commissioner; but the objections of the Respondents were overruled by the Order of the *Sudder* Board, on the ground that the Respondents had no right to the lands in question; and the purchaser was confirmed in his possession.

In the month of *October*, 1855, one *Gopeemohun Mitter* set up a claim to the holdings and lands under a lease, dated the 29th of *January*, 1851, to him by *Roy Bykantnath Chowdry* and the Respondents, of 12 *beegahs*, 4 *cottahs*, 15 *chittacks*, 3 *gundahs*, and 3 *cowries*, including the lands in question, for a term of fifteen years, at the yearly rent of Rs. 125; stating that he had given a counterpart lease and had enjoyed the profits.

Disputes as to possession having arisen between the purchaser and *Gopeemohun Mitter*, proceedings were had before the Magistrate, who ordered the lands to be put in possession of *Gopeemohun Mitter*. On appeal this Order was confirmed by the *Zillah* Judge.

Subsequently, on the 12th of *September*, 1855, the purchaser mortgaged the lands to one *Baboo Ram*

Rutton Roy, to secure the repayment of a sum of money he had borrowed from the *Baboo*. On the 25th *Assar*, 1263, B.E. (8th *July*, 1856), the purchaser, being unable to repay the mortgage money, and the lands being worth considerably more than the amount borrowed thereon, sold the lands to the Appellant for the sum of Rs. 7,325, and also his right to the mesne profits for the time he had been kept out of possession.

The present suit was then brought by the Appellant in the Court of the Principal *Sudder Ameen* of *Zillah* Twenty-four *Pergunnahs*. The suit was brought in the first instance against *Gopeemohun Mitter* and *Thakoordoss Bannerjee*, as Defendants; but by a supplemental plaint (in consequence of an objection for want of parties taken by the answer of *Gopeemohun Mitter*) the Respondents, and *Sreemutty Mirnomoe*, alias *Juggut Mohunee Dossee*, widow of *Roy Bykantnath Chowdry*, who was then deceased, were made Defendants to the suit. The original plaint stated, that the suit was brought for reversal of the Order of possession made in the proceedings before the Magistrate, and to set aside the lease of *Gopeemohun Mitter*, and to obtain possession of *beegahs* 1. 3. 8. 10 of land of holding, No. 28, and of *chittacks* 7. 15 of land of holding, No. 31, and of *beegahs* 6. 17. 15. 10 of land of holding, No. 39, aggregating *beegahs* 8. 1. 15. 15; of land of *Mouzah*, *Baliaghatta Dihee Shoora*; and to recover possession of a Bazaar and *wasilat* during the period of dispossession. The plaint alleged, that the Defendant, *Gepeemohun Mitter*, was a servant of *Roy Bykantnath Chowdry*, and submitted,

1867.
JUGGOMOHUN
BUKSHEE
v.
ROYMOTHOO-
RANATH
CHOWDRI.

1867.

JUGGOMOHUN
BUKSHEE

v.

ROYMOTHOO-
RANATH
CHOWDRY.

that if his alleged lease had been true, when the purchaser obtained possession of the lands through the Court, he would not have refrained for six months making any objections ; that after the sale to *Thakoordoss Bannerjee*, and possession under it had been taken by him, no rent was paid to *Gopeemohun Mitter* ; that *Thakoordoss Bannerjee* had been, immediately on his purchase, put into possession of these lands ; and that on the confiscation thereof by Government, the interests of all concerned therein were bound.

Gopeemohun Mitter, by his answer, alleged that the Defendant, *Thakoordoss Bannerjee*, had been *Mookter* of *Baboo Ram Rutton Roy* ; that the latter purchased with his own funds, through *Thakoordoss Bannerjee* and in his name, the rights and interest of *Roy Bykantnath Chowdry* alone ; that *Thakoordoss Bannerjee* was a nominal purchaser having no rights ; and that the Appellant was not competent to bring such a suit on a *Cobala* executed by *Thakoordoss Bannerjee* ; that the Appellant was a servant of *Baboo Ram Rutton Roy*, receiving a small pay ; that it was improbable that the Appellant could afford to pay a consideration sum of Rs. 7,325 to purchase the property, and that he had filed the suit through a fictitious person ; that the disputed property was the joint estate of *Roy Bykantnath*, *Roy Mothooranath*, *Roy Kistonath*, and *Roy Preonath* ; that when they were in joint possession of the above property, he took an *Ijarah*, or lease, of the same, together with other properties, from them, on the 17th *Maugh*, 1257, for fifteen years, at a *Fumma* of Rs. 125, and held possession thereof.

The Appellant, in his replication, denied the interest of *Baboo Ram Rutton Roy*, as well as the rights and

interest of the Respondents beneficially in the lands, and also the lease to *Gopeemohun Mitter*, and insisted that *Roy Bykantnath Chowdry* was alone the owner and registered proprietor of the lands in question, and that he had alone entered into settlement for it with Government, and was the sole legal owner thereof.

1867.
JUGGOMOHUN
BUKSHEE
v.
ROYMOTHOO-
RANATH
CHOWDRY:

The joint answer of the Respondents, *Mothooranath Chowdry*, *Kistonath Chowdry*, and *Preonath Chowdry*, to the original and amended plaint, stated, that the suit was in fact by *Baboo Ram Rutton Roy*, who used the Appellant's name; that the rights and interests of *Roy Bykantnath Chowdry* alone, in the disputed lands, were sold by way of punishment in consequence of his failure to appear; and submitted that only his share could be confiscated by Government, although he was in fact registered in the Government records as the sole proprietor: and the answer further alleged, that in the year 1851 all the co-sharers let out the disputed property, with other lands, in farm to the Defendant, *Gopeemohun Mitter*, at an annual rental of Rs. 125, for a term of fifteen years, and that he was put in possession.

The hearing of the suit took place on the 17th of *December*, 1858, before *E. Latour*, Esq., the Judge of the Civil Court of the Twenty-four *Pergunnahs*, when, by a decree of that date, the Appellant was declared entitled, in virtue of the rights of Government, to possession of the lands in question, with mesne profits from the date of dispossession, the decree reversing the Order of possession made under Act, No. IV. of 1840, and cancelling the lease set up by *Gopeemohun Mitter* as fraudulent, with costs. In the judgment delivered by that Judge, he said, "I am of opinion that, by the act of sequestration, unop-

1867.
 JUGGOMOHUN
 BUKSHEE
 v.
 ROYMOTHOO-
 RANATH
 CHOWDRY.

posed by the Defendants at the time of the confiscation and sale by Government, as Government was in possession of the property, that the course for the Defendants to follow is to sue to set aside the sale to the extent of their title, making Government a party, and the principal Defendant to that action. Holding this opinion, I do not think I ought to express any opinion as to the exhibits in support of that title. I am of opinion, that this course is open to the Defendants within twelve years next following the date of the attachment, as the *causa causans*. I am of opinion, with reference to the claim of the lessee, that the lease put in is to disturb the purchaser under a Government title, and to defeat it *per circuitum*. The Government had either a just title or a defective one. That can only be questioned in an action to establish an opposite title. I am of opinion, more particularly with reference to the Collector's letter of the 6th of *November*, 1855, and to the absence of all mention of this lease in the petitions of the brothers, that it is simply colourable, and that the Plaintiff is entitled, under his Government title, to be put in possession of what he purchased, in reversal of the award of the suit under Act, No. IV. of 1840, and in reversal and annulment of the lease set up by the Defendant, *Gopeemohun Mitter*, and with mesne profits from date of dispossession in execution, with costs."

Two separate appeals were instituted in the *Sudder Dewanny Adawlut* against this decree. One by *Gopeemohun Mitter*, which was, however, subsequently struck off for default, in consequence of his death intervening, and his heirs not appearing to prosecute the same. The other appeal was that of Respondents, *Mothooranath Chowdry*, *Kistonath Chowdry*, and *Preonath*

Chowdry. In their grounds of appeal objections were taken that the lands in question were their joint property, and that, therefore, the quota of *Roy Bykantnath Chowdry* alone passed to the purchaser from Government; and that there was no necessity for instituting a suit to set aside the sale; and that an auction sale did not convey any title other than that of the party whose right and interest are sold.

The appeal came on for hearing before Messrs. *H. T. Raikes*, *C. P. Trevor*, and *G. Loch*, three of the Judges of the late *Sudder Dewanny Adawlut*, on the 18th December, 1861, when a preliminary objection to such hearing was taken on the ground that the Respondents were not originally parties to the suit, the object of which was merely to set aside the lease set up by *Gopeemohun Mitter*; that his appeal having become abated by his death, and having been struck off for default on the part of his heirs reviving the suit, there was really nothing remaining in dispute between the parties before the Court, which could be decided in the present suit. The Court, however, decided that, as the Respondents had been made Defendants, and their title to the property put in issue, their appeal could proceed; and the Court on the merits made its decree, by which it was declared, that the Appellant was entitled to possession of that amount of undivided share only which the Defendants had admitted belonged to *Roy Bykantnath Chowdry*, viz., 2 a. 8 g. share of the lands in dispute; and also that the costs should be borne and paid in proportion of the sums decreed and dismissed respectively. In the judgment delivered by the *Sudder Court* they gave the following reasons: "The Plaintiff urged,

1867.
JUGGOMOHUN
BUKSHEE
v.
ROYMOTHOO-
RANATH
CHOWDRI.

1867.

JUGGOMOHUN
BUKSHEE

v.

ROYMOTHOO-
RANATH
CHOWDRY.

that as an auction purchaser and a stranger, he could do no more than exhibit the title he had received from the Collector, which comprised the whole property; and that it was for the Defendants, who advanced the claim, to prove that the property was held by them in coparceny." The Court, however, held, that the presumption, arising from the family being an undivided Hindoo family, according to the Plaintiff's admission, was, that the property was joint, as alleged by the Defendants, and that before they could call upon the Defendants to prove their claim the Plaintiff must give some *prima facie* proof of the sole right of *Roy Bykantnath Chowdry*, whose interests alone he had purchased; and as he was unable to do this, the Court considered him entitled to receive possession only of the share of the lands which the Defendants admitted to belong to *Roy Bykantnath Chowdry*, viz., 2 a. 8 g. of the property in dispute. To this extent the Court made a decree, with mesne profits.

Against this decree the present appeal was brought. No appearance having been put in by the Respondents, the hearing was *ex parte*.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

This is a question of title derived under a Government sale, and depends upon the true construction of *Ben. Reg. XI.* of 1796, under which the lands were sold. By the section 2, cl. 3, of that Regulation it is provided, that if a *Sudder* Farmer holding a Farm from Government resists criminal process, his lease is to be declared forfeited by the Collector of the District; and the third section points out the manner

in which the *Nizamut Adawlut* is to proceed either against the person or by attachment of the lands or farm. Section 6 provides, that if the party, being absent, neglects to attend for a period of six months after the lands have been attached, the Governor-General in Council may pass such order as he may judge proper as to the future disposal of the lands. This was done by the Government sale, and there is now no controversy as to the regularity of the proceedings in respect to the sale. The Governor-General's Order was decisive and, as a matter of public policy, final. A sale under such Regulation differs essentially from a judicial sale. *Ben. Reg. VII. of 1825*, therefore, does not apply. That Regulation relates only to judicial sales in execution of decrees or other judicial process, to which the Circular Letter of the *Sudder Dewanny Adawlut*, dated the 10th of June, 1842, is confined.

The presumption of a joint interest in the lands in question, on which the decree of the Court below is based, is one which can only be made available and enforced among members of a joint and undivided Hindoo family when suing among themselves. When, therefore, one of a joint family sets up, as against the others, an exclusive claim to property as his own separate and self-acquired estate, such a presumption has never been held to extend to claims in respect of property registered in the sole and individual name of a person who happens to be a member of the family. Admitting that the Respondents have proved that they had some beneficial interest, or some right to the joint enjoyment of the rents and profits received by their brother, *Roy Bykantnath Chowdry*, as lessee under Govern-

1867.
JUGGOMOHUN
BUKSHEE
v.
ROYMOTHOO-
RANATH
CHOWDRY.

1867.

JUGGOMOHUN
BUKSHEE

v.

ROYMOTHOO-
RANATH
CHOWDRY.

ment, such equitable interest might have been enforced against him, but could not in any manner prevent the legal effect of the attachment, and the forfeiture of the lease and lands, in consequence of the criminal default of the lessee, the legal holder of the lands. The Regulation deals with the lands only, and not with an equitable interest. So under the old Feudal law a forfeiture to the Crown would act on the legal estate without reference to the beneficial interest of others. The Respondents are estopped, as against the Appellant and the Government, through whom the Appellant claims title as derivative purchaser for valuable consideration, from setting up what would be a secret trust in their favour, and thereby defeating the legal effect of the attachment, forfeiture, and sale of the entirety of the lands. They allowed *Roy Bykantnath Chowdry* to be recognized as the sole owner.

Lastly, the suit was defective for want of parties. If it was intended to dispute the attachment, forfeiture and sale, the suit ought to have been so framed, and the Government made a party to the suit.

28th Feb.,
1867.

Their Lordships' judgment having been reserved, was now delivered by

The Right Hon. Sir JAMES W. COLVILE:—

The lands which are the subject of this suit are described as three separate holdings forming part of the Government *Khas Mehals* in the Twenty-four *Pergunnahs*. In 1855 they had been granted by the Government of *Bengal* to one *Roy Bykantnath Chowdry*, as the sole registered tenant thereof. His tenure is said to have been in the nature of a per-

petual lease; but the instrument or instruments creating it are not before us. He may be taken, however, to have been what is termed in the Regulation, which will be afterwards considered, "a *Sudder* Farmer paying revenue directly to Government." Some time in 1855, being charged with an offence, he absconded in order to avoid the process of the Criminal Courts; whereupon his estate was confiscated, and these lands, as part of it, were ordered by Government to be sold under the provisions of *Ben. Reg. XI. of 1796*. They were put up for sale on the 27th of *April*, 1855, and were purchased by one *Thakoordoss Bannerjee*, who on the 7th of *July*, 1856, transferred the interest thereby acquired to the Appellant. Under this title the Appellant claims the entire interest in the tenure under Government of these lands.

The Respondents insist that *Roy Bykantnath Chowdry* was a member of a joint and undivided Hindoo family, of which they are the other members; that these tenures, though taken in the sole name of *Roy Bykantnath Chowdry*, as the managing member, were acquired with the funds and for the benefit of the joint family; and that accordingly it was not competent to Government to confiscate or sell more than the fractional share and interest of *Roy Bykantnath Chowdry*, in this portion of the family estate. They urged this objection ineffectually before the Collector some days before the sale took place; they afterwards repeated it before the Commissioner and *Sudder* Board of Revenue; but they are said to have made no representations to that department of Government from which, under the Regulation, the Order for the sale emanated. Certain it is that their objections were

1867.

JUGGOMOHUN
BUKSHEE
v.
ROYMOTHOO-
RANATH
CHOWDRY.

1867.

JUGGOMOHUN
BUKSHEE
v.
ROYMOTHOO-
RANATH
CHOWDRY.

overruled, and that what was put up for sale and purchased by *Thakoordoss Bannerjee* was the whole interest in the lands under the tenures created in favour of *Roy Bykantnath Chowdry*. And the Collector put, as he thought, the purchaser into possession.

Before, however, the assignment to the Appellant, a dispute touching the possession of the lands arose between *Thakoordoss Bannerjee*, and one *Gopeemohun Mitter*, who claimed to be tenant thereof under a lease granted to him by *Roy Bykantnath Chowdry* and the Respondents jointly. There was the usual appeal to the Magistrate under Act, No. IV. of 1840. He held that *Gopeemohun Mitter* was in fact in possession, and his order was confirmed on appeal by the *Zillah* Judge. The result was, that the Appellant, having acquired the title of *Thakoordoss Bannerjee*, was driven to assert his right to the possession of the lands in the regular civil suit out of which this appeal has arisen.

The suit was originally against *Gopeemohun Mitter* and *Thakoordoss Bannerjee*. By supplemental plaint the Respondents were made parties to it. The material issues settled by the Judge were, first, whether the lease set up by the Defendant, *Gopeemohun Mitter*, was a *bonâ fide* lease, or merely colourable and in fraud of law; and secondly, whether the estate being joint, the Plaintiff could have any claim over and above the particular share of *Roy Bykantnath Chowdry*.

The *Zillah* Judge, by whom the cause was tried in the first instance, held that the lease was merely colourable and fraudulent, and that the Appellant, as between him and the lessee, was entitled to the possession of the lands. He further held, that the

question of title between the Appellant and the Respondents could not be properly tried in this suit ; and that the proper course for the Respondents, if they had a good title, was to sue to set aside the sale to the extent of that title, making the Government a party to the suit.

Both the lessee and the Respondents appealed against this decision, but the former died pending his appeal, which, not having been revived, was struck off. The Respondents prosecuted their appeal, and the *Sudder* Court, overruling the objection that the suit had come to an end with the lessee's interest, on the ground that there was a distinct issue of title joined between the Appellant and the Respondents, made a decree in their favour, and reduced the interest of the Appellant in the lands to the fractional share of *Roy Bykantnath Chowdry*. The present appeal is against the last decree.

It has been candidly conceded by the learned Counsel for the Appellant that the evidence in the cause may be taken as sufficient to establish that, as between *Roy Bykantnath Chowdry* and the Respondents, the lands in question formed part of their joint estate.

This being so, we have only to determine whether the decree of the *Sudder* Court is erroneous, either because, upon the true construction of the Regulation and the admitted facts of the case, the sale by Order of Government has given to the Appellant a good title against the Respondents ; or because that question cannot be properly litigated and determined in the present suit.

The Regulation is a highly penal one, and should be construed strictly. That portion of it which relates

1867.

JUGGOMOHUN
BUKSHEE
v.
ROYMOTHOO-
RANATH
CHOWDRY.

1867.
 JUGGOMOHUN
 BUKSHEE
 v.
 ROY MOTHOO-
 RANATH
 CHOWDRY.

to the present case is contained in the 4th, 5th, and 6th sections. The 4th section provides, that, after taking certain specified proceedings, the Magistrate is to order the attachment of any land or other real property held by the absentee in his jurisdiction, by requiring the Collector, if the absentee be a proprietor of land or *Sudder* Farmer paying revenue immediately to Government, to hold the land or farm in attachment until further notice; and prescribes the measures to be taken by the Collector on receiving such a requisition. The 5th section provides for the removal of the attachment on the attendance of the party; and the 6th section enacts, "Should the absentee neglect to attend for a period of six months after the lands have been ordered under attachment, the Magistrate is to report the case to the Governor-General in Council, who will pass such order upon it, and upon the future disposal of the lands, as he may judge proper."

In the absence of clear words indicating such an intention, it cannot be assumed that the Legislature intended to authorize the confiscation of the property of any person other than the delinquent. The Regulation makes no express provision for the case of joint proprietors of land, or persons jointly holding a *Sudder* farm of land. Let it be assumed that such a joint proprietorship, or joint holding, is ostensible as well as real, and that it appears on the Collector's Books, can it be doubted that in such a case the words "land or other real property held by the absentee" would be limited to his undivided share in the actual lands or farm? Again, suppose that the absentee is one of a joint family possessed of a *Zemindary*, of which one member only is registered

as owner. Their Lordships cannot think that upon the true construction of this Regulation the fact of such registration would either justify the confiscation of the whole *Zemindary*, if the absentee were the sole registered proprietor, or prevent the confiscation of the share of the absentee if he were not the registered proprietor. No analogy can be drawn from the doctrine of forfeiture in this country, where the doctrine is founded on tenure, and where there was a broad and marked distinction between law and equity, the Courts of Common Law taking no cognizance of equitable estates. And, if what is above stated be true of a *Zemindary* or other real property of which the absolute interest belongs to a joint family, it is difficult to see why it should not be true of a Farm enjoyed by a joint family as part of the joint estate, though taken in the name of one of its members. For the Regulation, at least in the part of it now under consideration, does not contemplate the forfeiture of the tenure, as between landlord and tenant. What it contemplates is the confiscation and sale of the tenure; and the course pursued in the particular case confirms this construction.

Again, there is no pretence for saying that a sale under this Regulation can carry with it the consequences of a sale for arrears of public revenue; that it sweeps away all sub-tenures or incumbrances created by the delinquent, or those through whom he claims. The tenure in question, so far as appears on these proceedings, was alienable. It was open, therefore, to *Roy Bykantsnath Chowdry* to put his co-sharers in the estate into the full enjoyment of this Farm, and to execute jointly with them, if they

1867.

JUGGOMOHUN
BUKSHEE

v.

ROYMOTHOO-
RANATH
CHOWDRY.

1867.

JUGGOMOHUN
BUKSHEE

v.

ROYMOTHOO-
RANATH
CHOWDRY.

were so minded, sub-leases of the lands. No actual conveyance would, under the Hindoo law, be required for the former purpose. Their Lordships, therefore, are unable to affirm the broad proposition, that under the Regulation it was competent to Government to confiscate and sell this Farm, so as to give to the purchaser a good title against the Respondents. The *Zillah* Judge, though, he declined to deal with the question in this suit, has not so decided. The *Sudder* Court has decided the contrary.

It remains to be considered whether the *Sudder* Court was right in determining the question of title between the Appellant and the Respondents in this suit. The Appellant had by supplemental plaint made the Respondents parties to the suit, though under a kind of protest that it was unnecessary to do so ; and this issue of title had been raised and joined between them. The only difficulty in the case is, that the lease of *Gopeemohun Mitter*, who was put forward as the tenant in possession, has been pronounced by the *Zillah* Judge to be simply colourable, and that the *Sudder* Court has not dealt with his finding on that point. Considering, however, that as between *Gopeemohun Mitter* and the Respondents the lease constituted the relation of landlords and tenant, and that the intervention of the landlords to defend rested on privity of title ; and, further, that the effect of the proceedings in the *Foujdary* Court of the 31st of *December*, 1855, and the 29th of *March*, 1856, was to determine that the Appellant was out of possession, and to cast upon him the burden of recovering possession by proof of a good title, and that he has failed to do so except to the

extent admitted by the *Sudder* Court, their Lordships think that the decree under appeal is correct. They must, therefore, humbly recommend Her Majesty to dismiss this appeal.

1867.
JUGGOMOHUN
BUKSHEE
v.
ROYMOTHOO-
RANATH
CHOWDRY.

NUGENDERCHUNDER GHOSE and } *Appellants,*
another ... }

AND

SREEMUTTY KAMINEE DOSSEE and } *Respondents.**
others ... }

*On appeal from the High Court of Judicature
at Calcutta.*

THE suit out of which this appeal arose was in the nature of a supplemental suit brought to obtain the benefit of a decree made in a previous suit, in which one of the Respondents, *Gourmonee Dossee*, was the

° Present :—Members of the *Judicial Committee*—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

any party, not being a proprietor of the estate in arrear, the amount of the arrear of revenue due from it, to be carried to the credit of the said estate at sunset aforesaid, unless before that time the arrear shall have been liquidated by a proprietor of the estate. And in case the party depositing, whose money shall have been credited to the estate as aforesaid, shall prove, before a competent Civil Court, that the deposit was made in order to protect an interest of the said party, which would have been

19th Feb.,
1867.

Section 9 of
Act, No. I. of
1845, enacts,
that Collec-
tors shall, at
any time be-
fore sunset of
the latest day
of payment,
receive as a
deposit from

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

Plaintiff, and the Respondent, *Kaminee Dossee*, the widow of the late *Hurrololl Mitter*, the Defendant.

In the original suit a decree was made in the year 1853, in favour of *Gourmonee Dossee*. The interest in that suit was afterwards assigned to one *Anundonarain Ghose*, the father of the Appellants, for the amount named in the decree, with interest, which had been previously paid by her, as the mortgagee's representative, to the Government Collector, in order to preserve a *Talook*, hereinafter mentioned, which had been mortgaged, from a public sale then about to take place, for arrears of Government revenue due in respect thereof, through the default of *Kaminee Dossee*, the childless widow of the mortgagor, *Hurrololl Mitter*,

endangered or damaged by the sale of the estate, he shall be entitled to recover the amount of the deposit, with interest, from the proprietor of the said estate. Held, upon a construction of this section, that it only gave a personal right of action against the proprietor, and did not create a lien on the estate.

A. mortgaged his estate to *B.* The mortgagor died, leaving a childless widow his heir. *A.* had children, living, at his death, by a former deceased wife. The widow of the mortgagor, who was in possession, let the estate fall into arrears for Government revenue, when the representative of the mortgagee, in order to save the estate from public sale, paid the arrears. The mortgagee's representative afterwards brought a suit against the widow to recover the amount so paid, which suit did not raise any claim against the estate itself, but sought only to make the widow personally liable, and a decree was obtained against her to that effect. When execution of the decree was sought to be enforced against the widow, by sale of the estate, the mortgagor's contingent reversioners intervened, and the Court held that execution could not issue against the estate of the mortgagor, which was not liable. A supplemental suit was then brought by the mortgagee's representative, to recover the amount of the decree so obtained, with interest, and for sale of the estate. The High Court held, upon the construction of the 9th section of the Act, No. I. of 1845, that the action to enforce the decree was confined to the widow's interest in her husband's estate, which estate could not be sold.

Upon appeal the Judicial Committee, in affirming the judgment, held, that the decree so obtained against the widow in possession, could only be enforced against her property in respect of such interest in her deceased husband's estate as she possessed.

Held, further, that there were two courses open to the mortgagee's representative, first, to have instituted a suit to enforce the mortgage, and to tack to the mortgage the amount of the arrears of revenue paid to save the estate, and for a sale; or, secondly, to have proceeded under the 9th section of the Act, No. I. of 1845, in a personal action.

being as such in possession of the *Talook*, and bound to pay the Government revenue in respect thereof. This decree was affirmed on appeal by the *Sudder Dewanny Adawlut*, in *December*, 1855, on the ground that the payment of the arrears of Government revenue was necessary to guard the mortgagee's interest in the *Talook*, as, if the same had been sold, her rights as mortgagee would have been entirely lost. The amount so decreed not having been repaid, process of execution was taken out against the *Talook* in respect of which payment had been made, which was then still in the possession of *Kaminee Dossee* as the registered proprietor thereof. The *Talook* was then attached and was about to be sold by the Civil Court in order to realize the amount of the last-mentioned decree, when one of the Respondents, *Sreemutty Dossee*, intervened in the execution proceeding, and objected on the ground that she, as daughter of the mortgagor, and her two sons, were expectant heirs in reversion, contingent on their surviving *Kaminee Dossee*, the widow and heiress in possession, and that as such heirs, they would then be entitled to succeed to the *Talook*; contending that the original decree ought to be considered merely as a simple personal decree against *Kaminee Dossee*, and that the amount thereof as her personal debt, was not realizable from the *Talook*, of which she was in possession as widow. The Principal *Sudder Ameen*, by his judgment and summary Order, declared that the questions raised could not be decided in that summary proceeding, but ought to be determined in a regular civil suit, and that the attachment of the *Talook* should be withdrawn.

The suit out of which the present appeal arose, was,

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

in consequence, brought by *George Smoult Fagan*, the then Receiver of the estate of *Anundonarain Ghose*, the Appellants' father, against (among others) *Kaminee Dossee*, and the reversionary contingent heirs, praying that the amount of the original decree might be realized by selling the *Talook*.

The question on appeal substantially involved two points : first, the construction of sec. 9 of Act, No. I. of 1845 ; and, secondly, the frame of the first suit in respect of the relief sought by the Plaintiff.

By sec. 9 of that Act it is enacted, "that Collectors shall, at any time before sunset of the latest day of payment, receive as a deposit from any party, not being the proprietor of the estate in arrear, the amount of the arrear of revenue due from it, to be carried to the credit of the said estate at sunset as aforesaid, unless before that time the arrear shall have been liquidated by a proprietor of the estate. And in case the party so depositing, whose money shall have been credited to the estate in the manner aforesaid, shall be a Plaintiff in a suit pending before a Court of Justice for possession of the same, or any part thereof, it shall be competent to the Judge of the *Zillah* in which such estate is situated, to order the said party to be put into temporary possession of the said estate, subject to the rules in force for taking security in the cases of Appellants and Defendants. And if the party depositing, whose money shall have been credited as aforesaid, shall prove, before a competent Civil Court, that the deposit was made in order to protect an interest of the said party, which would have been endangered or damaged by the sale of the estate, he shall be entitled to recover the

amount of the deposit, with interest, from the proprietors of the said estate."

The facts of the case were as follows :—

Hurrololl Mitter executed a mortgage of a *Talook*, called *Turuff Kalikapore*, in favour of one *Nobinkisto Sing*, to secure the repayment of the sum of Rs. 43,430. 4, with interest.

Hurrololl Mitter died without male issue, and without having repaid the mortgage money, leaving the Respondent, *Kaminee Dossee*, his widow, and a married daughter, the Respondent, *Sreemutty Dossee*, who had two sons.

Kaminee Dossee, on her husband's death, entered into possession of the *Talook*, and was registered as sole proprietor thereof in the Books of the Government Collector.

Nobinkisto Sing, the mortgagee, subsequently died, leaving the Respondent, *Gourmonee Dossee*, his widow, heiress and legal representative, him surviving, and as such she became entitled to the interest of her deceased husband as mortgagee.

In *December*, 1849, there were arrears owing to Government for revenue, payable on account of the *Talook*, amounting to the sum of Rs. 10,317, which the Respondent, *Kaminee Dossee*, failed to pay, and such default endangered the interest of the mortgagee, whose estate therein was thereby liable to be destroyed by a sale of the *Talook* by the Government Collector under the Revenue Sale Law, Act, No. 1 of 1845, sec. 26, to realize such arrears. *Gourmonee Dossee*, the heir and representative of the mortgagee, having received intimation of the default and the danger which threatened the estate, raised the amount necessary by way of loan from *Anundonarain*

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

1867.
 NUGENDER-
 CHUNDER
 GHOSE
 v.
 SREEMUTTY
 KAMINEE
 DOSSEE.

Ghose, the late father of the Appellants, and paid off the arrears, amounting to Rs. 10,317.

The Respondent, *Gourmonee Dossee*, made repeated ineffectual demands on *Kaminee Dossee* for repayment of this sum of money, and on the 3rd of *December*, 1851, brought a suit in the Court of the Principal *Sudder Ameen* of *Zillah* Twenty-four *Pergunnahs* against her, to recover that sum, together with interest, amounting to Rs. 12,689. 14. The suit was heard by the Principal *Sudder Ameen*, on the 29th of *March*, 1853, when he was of opinion that *Kaminee Dossee* having made default, that *Gourmonee Dossee* had rightly made the payment, and so preserved the mortgaged *Talook* from sale, and decreed the sum of Rs. 14,337. 3, the money claimed, and interest from date of suit to day of payment, and costs.

Kaminee Dossee appealed to the *Sudder Dewanny Adawlut*; and the hearing of that appeal took place on the 4th of *December*, 1855, when that Court affirmed the decree of the Principal *Sudder Ameen*.

Gourmonee Dossee, and her late husband's brother's son, *Nobinkisto Sing*, subsequently assigned and transferred the last-mentioned decree to the Respondent, *Girenderchunder Ghose*, son of *Anundonarain Ghose*, then deceased, in consideration of the sum of money borrowed from him to discharge the Government arrears. He took the usual proceedings in the *Zillah* Court, to sue out execution under the last-mentioned decree, and the *Talook* was accordingly attached under the execution process of the Court, and thereupon a proclamation was issued that the same would be sold to realize the judgment debt, in execution of such decree.

On the 25th of *January*, 1856, *Sreemutty Dossee* intervened in these proceedings, objecting to the sale, stating that the judgment debtor, *Kaminee Dossee*, her step-mother, was a childless widow, and that in satisfaction of her personal debt the *Talook* to which her minor son, *Kooman Rajendernarain*, had a reversionary right, could not be sold in execution of the decree. *Girenderchunder Ghose*, as representing the decree-holder, by his answer denied that the amount decreed was a mere personal debt of the judgment debtor, *Kaminee Dossee*, but had been decreed against her as being in possession of the *Talook* as sole registered proprietress; that *Gourmonee Dossee* had borrowed from his father the money and paid it to the Collector in order to protect the *Talook* from sale for arrears of revenue due to Government; and that the decree under which execution had issued against that *Talook*, was for that same sum of money.

The hearing of the petition in this summary suit took place on the 18th of *March*, 1856, before *Tarucknath Sein*, the Principal *Sudder Ameen*, who made an order staying the sale, but declining to adjudicate on the question raised, which he considered ought to be determined in a civil action. This order was on appeal affirmed by the *Sudder Dewanny Court*.

In consequence, on the 16th of *August*, 1859, *George Smoult Fagan* the Receiver of the estate of *Anundonarain Ghose*, deceased, brought a regular suit in the Court of the Principal *Sudder Ameen* of *Zillah Twenty-four Pergunnahs*, against the Respondents, *Kaminee Dossee*, *Gourmonee Dossee*, *Sreemutty Dossee*, her two minor sons, *Rajendernarain Deb*, and *Soo-rendronarain Deb*, and *Girenderchunder Ghose*, and

1867.

NUGENDER-
CHUNDER
GHOSEv.
SREEMUTTY
KAMINEE
DOSSEE.

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

also against the other Respondents, claiming as *Putneedars*, or lessees and tenants under *Kaminee Dossee*. The plaint set forth in detail the principal facts before mentioned, and sought the realization of the amount of the above-mentioned decree, together with interest and costs, by sale of the *Talook*, and reversal of the summary Order, as well as the alleged *Putnee* leases.

The answer of *Sreemutty Dossee* submitted, that the decree was for the realization of money due by *Kaminee Dossee*; that the Plaintiff, therefore, had no right to institute a suit for the recovery of the amount of that decree, by a sale of the *Talook* in question; that her sons were reversioners, and her step-mother, *Kaminee Dossee*, was entitled only to maintenance for her life out of the profits, after performing the *straud* and other ceremonies to her deceased husband and his father, and that she and her son's rights could not be destroyed, the *Talook* not being liable to be sold.

The answer of *Kaminee Dossee* was, in substance, first, that the Plaintiff, who had become a representative by purchasing from *Gourmonee Dossee*, her decree, was not entitled to any more right than what is mentioned in that decree; secondly, that the principal decree-holder, *Gourmonee Dossee*, instead of praying for the sale of the *Talook* mentioned in the original plaint, simply sued to recover the amount of the advance from her, and, therefore, by sec. 7 of Act, No. VIII. of 1859, the suit was liable to be dismissed as if it was a second suit instituted by *Gourmonee Dossee* herself, it would have been; thirdly, that with the object of liquidating her husband's debts she granted *putnees* of the *Talook*,

with the profits of which she had paid off her husband's debts, and that such *putnees* could not be set aside ; and lastly, that as large sums of money were due to her from the late *Nobinkisto Sing*, who was the Executor to the estate of her deceased husband, she could not be held liable for the amount of the decree obtained by *Gourmonee Dossee*.

The Defendants, the *Putneedars*, relied on their *Pottahs*.

The hearing of the suit took place on the 9th of *December*, 1859, before *E. Latour*, Esq., the Judge of the *Zillah* Court, when he pronounced a decree in favour of the Plaintiff, declaring that the *Talook* was liable in execution, and ordering that the proprietary right therein generally should be brought to sale ; but at the same time declaring that the validity of the alleged *Putnee* leases could not be decided in that suit, and that the Plaintiff should pay the *Putneedars* their costs. The judgment in which that decree was made stated, that the original decree in question in the suit was not one restraining the remedies open to the Plaintiff so as to confine the decree-holder to remedies personal to her ; that there were no such words therein, as there assuredly would have been if the Court had intended to limit the decree ; that the suit in which that decree had been obtained was brought against *Kaminee Dossee* as being in possession of the estate, and that the decree was against her in that capacity, and that the law made the proprietary interest responsible for any sums advanced to protect the estate ; and that also a statutory liability upon the proprietary title was created, by making the advance in question ; that the original decree-holder brought her action against *Kaminee Dossee* being

1867.

NUGENDER-
CHUNDER
GHOSE

v.
SREEMUTTY
KAMINEE
DOSSEE.

1867.
 NUGENDER-
 CHUNDER
 GHOSE
 v.
 SREEMUTTY
 KAMINEE
 DOSSEE.

in possession, and recovered judgment in general terms, that it was not usual to apply in anticipation for execution against any particular property; and that certainly the suit was not one brought personally as a personal action only against *Kaminee Dossee*; and finally held that the decree bound her in her character as in possession of the estate.

Sreemutty Dossee appealed against this decree to the *Sudder Dewanny Adawlut* at *Calcutta*, on the ground, that the decree sought to be enforced was against *Kaminee Dossee* personally, and the suit in which the decree was made was brought against her and sought payment from her solely; that neither the original decree-holder, nor the purchaser of that decree, could go beyond that and seek to attach and sell the estate to make good the amount recovered, and that, even admitting the peculiar character of the debt decreed, as being a loan to a widow on the plea of necessity for discharging the dues of Government, the estate could not be subject for such a loan without good and sufficient grounds.

Five other separate appeals were also instituted in the *Sudder Dewanny Adawlut* by the *Putneedars*.

The Plaintiff, *Fagan*, ceased to act as Receiver, and the Appellants were substituted for him in the appeal in the *Sudder Dewanny Adawlut*.

The six appeals were consolidated and heard together as one appeal, on the 15th of *December*, 1862, before the High Court of Judicature at *Fort William*, in *Bengal*, which Court had been substituted for the *Sudder Dewanny Adawlut*. Two of the Judges, Messrs. *Trevor* and *Jackson*, pronounced the judgment and decree of the Court in the appeals as follows:—"The only point which we have to determine in this appeal

is, whether as the decree in the suit brought against *Kaminee Dossee* by *Gourmonee Dossee*, for the recovery of a sum of money paid to protect her own interests as mortgagee, and to save the estate on which she held the mortgage from sale, though personal in its terms against *Kaminee Dossee*, does or does not, under section 9, Act, No. I. of 1845, give, to use the Judges' term, 'to the decree-holder a statutory lien on the estate.' Were the case one of first impression, we should even then have little hesitation, looking to the plain terms of the Act, which simply gives a right of action against the proprietors of the estate, in declaring that a decree in a suit brought under the section of the Act above cited, is only a personal one, and gives no equitable lien on the estate to the decree-holder, so that the property itself in the hands of the person on whose account the payment was made, or any purchaser from him, is liable for the amount decreed. But there is a decision of the late *Sudder Court* which is clearly in point. In the case of *Govindpersaud Pundit v. Mussamut Soondree Koonwur Debea* (see Decisions for 1856, pp. 867, and 868), the *Sudder Court* held distinctly, that a person who deposits money in the Collector's office under the provisions of section 9 of Act, No. I. of 1845, in order to save an estate from sale, does not thereby acquire a preferable lien, but his rights in execution of the decree against the *Zemindar* are precisely the same as those of an ordinary judgment creditor; that the law simply exacts that the party paying the deposit shall be entitled to recover the amount of it, with interest, from the proprietors of the estate, but that the intent of the law as gathered from the words of Act was not that the party should have a lien on the estate. With this ruling we entirely concur. The Defendants,

1867.
 NUGENDER-
 CHUNDER
 GHOSE
 v.
 SREEMUTTY
 KAMINEE
 DOSSEE.

1867.
 NUGENDER
 CHUNDER
 GHOSE
 v.
 SREEMUTTY
 KAMINEE
 DOSSEE.

Respondents, however contended that the case of *Manickmalla Chowdhraïn v. Parbatty Chowdhraïn* (Decisions for 1859, pp. 515 to 521) establishes the principle contended for by them. On reverting, however, to that judgment, which was not an unanimous one, we find that the suit was not one under section 9, of Act, No. 1. 1845 at all, that is, it was not the case of a party not a proprietor with an interest to protect, but the case of a co-sharer paying in revenue on behalf of other sharers, who had failed to pay theirs, and who sued his sharers for their contribution; such being the nature of the case, the Court held that a co-sharer who has brought an action against a Hindoo widow for her share of the revenue which he had been obliged to pay in to save the joint estate from sale, could, after that widow had adopted a son, bring a second action against him on his obtaining possession of the estate, for so much of the first decree as remained unsatisfied, and could in execution of this last decree bring the adopted son's estate to sale, as the payment was made under necessity and for the benefit of the estate which has descended to the son, and which would not have so descended had the payment not been made. Now, whether the judgment in that case be correct on all points or not, it is clear that it can have no bearing on the present case, which is an action under a special law, which gives parties under particular circumstances a right of action against particular persons, which they otherwise would not have had by law. We may, therefore, dismiss this case from our consideration, and looking to the terms of the Act itself, and the precedent of the *Sudder* Court above cited, we hold that the decree against *Kaminee Dossee* was a personal one against her; that, consequently, the

action of the Court, in execution, must be confined to her husband's interest in the estate, and that the rights of *Kaminee Dossee's* husband in the estate, as a portion of the estate upon which an equitable lien was acquired by the Plaintiff, cannot be brought to sale. We, therefore, reverse the Civil Judges' decision, and decree the Defendant *Sreemutty Dossee's* appeal with costs. As to the appeal of the Defendants, *Putneedars*, on the question of costs, we are of opinion that, as they have been made unnecessarily Defendants, and charged also causelessly with fraud, they are, on the Plaintiff's failing in his action, entitled to their full costs. We, therefore, decree these five appeals also with costs against the Plaintiff."

Nugenderchunder Ghose and *Mohunderchunder Ghose*, the sons and heirs of *Anundonarain Ghose*, appealed from this decree. As the Respondents did not appear, the case was heard *ex parte*.

The Attorney-General (Sir *John Rolt*, Q. C.), and Mr. *Leith*, for the Appellants.

This suit involves a question of importance in *India*. It is whether the heir of the mortgagee, paying arrears of Government revenue to save the estate from sale for arrears, which the mortgagor's widow allowed it to fall into, is not entitled, under Act, No. I. of 1845, sec. 9, to a lien or charge on the mortgaged estate. We submit, that on general principles of equity the payer is entitled to have what she advanced treated as a charge, as in the analogous case of an insurance premium paid to keep up the insurance. Such payment creates a lien on the estate for the sum paid to save the estate. *Manickmalla Chowdhraïn v. Parbatty*

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

Chowdhraïn (a); but the Court below held, on the authority of *Govindpersaud Pundit v. Mussamut Soon-dree Koonwur Debea* (b), that it was a mere personal charge. This conclusion, we submit, was erroneous. By the Hindoo law a loan made to a widow, for the purpose of discharging arrears of Government revenue, and so saving from sale the estate in which she is in possession as tenant for life, in her character of legal representative of her deceased husband, becomes *ipso facto* a charge on such estate, not only while in her possession, but also when it passes into the possession of the successive heirs of her deceased husband, whose rights of inheritance only accrue on the widow's death. Such loan is not considered or treated as her personal debt, but as one which is due from the estate of her husband. Similar to the case of a Manager or guardian, who has power, by Hindoo law, to mortgage or charge the estate in order to avert sale or loss. *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (c), and cases there cited (d), *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh* (e), *Gopee Mohun Takoor v. Rajah Radhanat* (f); so also a widow can create a lien on her deceased husband's estate when it is for its benefit, which will bind the reversioner. Sum. Dec. S. D. A. Cal. 1854, p. 209, tit. "widow." *Preaj Nurain v. Ajodhyapurshad* (g), *Sheogovindpershad Singh v. Ramchund Doobe* (h).

The Act, No. I. of 1845, does not limit or restrict the operation and application of such principle of law,

(a) See Dec. of Sud. Court for 1856, p. 867.

(b) See Dec. of Sud. Court for 1859, pp. 516, 521.

(c) 6 Moore's Ind. App. Cases, 393.

(d) *Ib.* 407.

(e) 10 Moore's Ind. App. Cases, 454.

(f) 2 Knapp's P. C. Cases, 228. (g) 7 S. D. A. Rep., 513.

(h) 10 S. D. A. Rep., N. W. Prov., 133.

but gives rather additional facilities to all classes of persons in any way interested in the estate, provided they are not proprietors, to discharge arrears of Government revenue on default made by the proprietors, allowing such persons to make payments for that purpose directly to the Government Collector, and making it compulsory on that Officer to receive such payments, and carry the same to "the credit of the estate;" and further giving a right of action to the persons so paying against the proprietors as representing the estate, between whom otherwise there might not exist any legal privity, to enable the former to recover, by means of an action and the judgment to be obtained therein, the amount advanced and paid by them on account of the estate, with interest. Now, at the date of the original suit *Kaminee Dossee* was, as widow of *Hurrololl Mitter*, the proprietor of the *Talook*, within the true meaning of the Act, and as such was the only person against whom the Plaintiff, who had paid and discharged the arrears of Government revenue on her default, could have brought her suit under the Act, in order to recover from the estate the amount paid by her; and under the decree obtained by the Plaintiff against *Kaminee Dossee* in the character of proprietor, the Plaintiff was entitled to issue execution against the *Talook*, and to have the same sold in order to realize the amount decreed. The Respondent, *Sreemutty Dossee*, as daughter, and her sons, *Rajendernarain Deb* and *Soorendronarain Deb*, as grandsons of *Hurrololl Mitter*, the deceased husband of *Kaminee Dossee*, were not, according to the true meaning of the Act, persons to be made parties Defendants in the original suit. They were properly excluded from the suit, being

1867.

NUGENDER-
CHUNDER
GHOSEv.
SREEMUTTY
KAMINEE
DOSSEE.

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

only presumptive or expectant reversionary heirs of *Hurrololl Mitter*, whose several rights of inheritance are contingent on their respectively surviving *Kaminee Dossee*, in whom alone, as widow and heiress-at-law, the proprietary rights in the *Talook* became on the death of her husband and still remain vested; but *Sreemutty Dossee* and her sons improperly intervened in the summary proceedings in execution of the decree, in order to prevent the sale of the *Talook*; and by their so intervening, and the Principal *Sudder Ameen's* Order, of the 18th of *March*, 1856, made in such summary proceeding, this suit, being by way of a supplemental suit to the original suit, was rendered necessary to obtain an adjudication upon the claims and alleged rights of those persons, and to enforce the sale of the *Talook*. *Dilaram v. Roopchund Sahoo* (a) is an authority that the purchase money can be recovered in a new suit.

The consideration of their Lordships' judgment was postponed, and now delivered by

17th July,
1867.

The Right Hon. LORD ROMILLY:

The question, in this case, is whether, under the circumstances set forth in these papers, the Appellants are entitled to have a lien upon the *Talook* described as *Turuff Kalikapore*, recorded as No. 109, as against the Respondents, who are interested in that *Talook*, in respect of the arrears of revenue due from that *Talook*, which have been paid by the party the Appellants represent.

The Respondents do not appear, and it is, therefore, incumbent on the Court to examine closely whether the Appellants have made out their case and have es-

(a) 3 Ben. Sud. Dew. Rep. 24.

tablished their right to have the *Talook* sold to discharge that amount.

The facts are shortly as follows: *Hurrololl Mitter* had become the owner of this *Talook* by purchase previously to the year 1842. In *May*, 1842, he executed a mortgage in due form to *Nobokisto Sing* to secure Rs. 43,340 with interest at twelve per cent. per annum.

Hurrololl Mitter, the mortgagor, died, leaving *Sreemutty Kaminee Dossee*, his widow, surviving him. She had no child, and after his death continued in possession of the *Talook* as his widow.

Hurrololl Mitter, however, had a daughter by a previous marriage, the Respondent, *Mussumat Sreemutty Dossee*, who is the mother of two infant sons, the grandsons of the mortgagor, *Hurrololl Mitter*. *Nobinkisto Sing*, the mortgagee, died shortly afterwards, and left *Sreemutty Gourmonee Dossee*, his widow, who in that character became entitled to all the rights of her husband as mortgagee of this *Talook*.

The revenue due to the Government for this *Talook* was not paid by the widow of *Hurrololl Mitter*, the mortgagor, and in *December*, 1849, Rs. 10,317 were due in respect of such revenue.

In consequence of the non-payment of this arrear, the *Talook* would have been put up for sale by the Government Collector, and would have been sold according to Act, No. 1 of 1845, discharged from the mortgage and from all other incumbrances. In order to save the mortgage and the *Talook*, *Sreemutty Gourmonee Dossee* borrowed from *Anundonarain Ghose*, on the last day for payment of the revenue, which was the 28th of *December*, 1849, the amount necessary to discharge the revenue, viz., Rs. 10,317.

1867.

NUGENDER-
CHUNDER
GHOSE

v.
SREEMUTTY
KAMINEE
DOSSEE.

1867.

NUGENDER-
CHUNDER
GHOSE

vs.
SREEMUTTY
KAMINEE
DOSSEE.

and he deposited that amount with the Collector just before sunset on that day.

The Appellants are two of the sons and heirs of *Anundonarain Ghose*, who is dead, claiming under a transfer made to one of them by *Sreemutty Gourmonee Dossee* of her rights to and interests in the *Talook*, under her decree against *Sreemutty Kaminee Dossee* of the 29th of *March*, 1853, which will be afterwards mentioned; and accordingly they have the same rights and powers which she possessed as regards this *Talook* under that decree, and not further. The question there was the same which is raised on this appeal, viz., whether the Appellants were entitled to a charge on this *Talook*, and to have it sold in its entirety to pay the amount of the money so paid to the Government Collector in *December*, 1849.

For the purpose of determining this question, it is desirable to consider what, after such payments, the rights of *Sreemutty Gourmonee Dossee* were against *Sreemutty Kaminee Dossee* and the *Talook* itself, and the course she adopted.

Considering that the payment of the revenue by the mortgagee will prevent the *Talook* from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the *Talook* as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the *Talook* as against all persons interested therein for the amount of the money so paid. But their Lordships are of opinion, that this is not the form in which the question comes before them, and that what they have to decide, is not whether such a

charge originally existed, or whether it does now subsist, but whether the Appellants can enforce such a charge in the present suit. For this purpose it is necessary to refer to the steps taken by *Gourmonee Dossee* to obtain payment. There were two courses open to her: she might have instituted a suit to enforce the mortgage and to tack to the mortgage the amount of the revenue paid by her to save the estate, and to have the estate sold to pay that amount; or she might proceed under the ninth section of Act, No. 1 of 1845. She might probably have united both these objects in one plaint; but the course which she did adopt was to sue the widow, *Kaminee Dossee*, alone, under the ninth section of the Act, No. 1 of 1845, not making the persons interested in the reversion after her decease party-Defendants to that suit, and not praying that the *Talook* in its entirety might be sold to pay the amount due to her.

The plaint does not raise any claim against the estate itself; the claim is against the widow, *Kaminee Dossee*, personally. It states, first, that the female Defendant, for the purpose of doing away with the mortgage loan, threw the *Talook* into arrears, and was endeavouring to have it sold; secondly, that the female Plaintiff, for the purpose of protecting her rights, and preserving the *Talook* from sale, borrowed the money from the father of the present Appellants, and caused the payments to be made. The words of the plaint which follow are these:—"The female Plaintiff has paid the money which the female Defendant ought to have repaid. The Plaintiff has frequently called upon her for it, but no payment at all is made up to this time;" and, after stating the amount, the plaint proceeds thus: "for the recovery of which amount this suit is instituted against

1867.

NUGENDER-
CHUNDER
GHOSE

v.
SREEMUTTY
KAMINEE
DOSSEE.

1867.
 NUGENDER-
 CHUNDER
 GHOSE
 v.
 SREEMUTTY
 KAMINEE
 DOSSEE.

the female Defendant, and Plaintiff prays that the amount claimed, together with the interest thereof, due to the date of liquidation, be paid to her." The answer to the plaint merely contests the debt. It contends that no money was due on the mortgage, and that this would appear to be the case in a suit which had been instituted by the Defendant against the Plaintiff, seeking for an account against the Plaintiff as the Executrix of the husband of the Defendant. It is solely an answer directed to meet a personal claim, and accordingly the reply is to the same point, and relies on the ninth section of Act No. 1 of year 1845. [His Lordship read the section, *ante* p. 244.]

This section clearly authorizes the personal action, but it gives no remedy against the land, which it leaves to the then existing law.

The decree which was made in this suit is, as might be expected, no decree against the land, but it is a general decree against the Defendant, *Kaminee Dossee*. It is in these words:—"Let the female Plaintiff get the money claimed and interest due from date of suit to day of payment, and costs, together with interest, according to practice, from the female Defendant. Costs on the part of the female Defendant are charged to her."

This decision was appealed from, and affirmed; but the only point which seems to have been argued and decided in that suit, either on the original hearing or on the appeal, was whether, while the other suit already mentioned was pending, for an account between the same parties, and in which *Kaminee Dossee*, the Defendant in this suit, claimed a large balance to be due to her from *Gourmonee Dossee*, the Plaintiff in the suit, which is the founda-

tion of the present proceedings, the Plaintiff, as mortgagee, before the fact that anything was due to her had been ascertained, had such an interest in the *Talook* as entitled her to pay the arrears of the revenue. If she had, it followed as of course that under the ninth section of the Act, No. 1 of 1845, already mentioned, she could recover the amount in the suit in question.

Shortly after this, *Gourmonee Dossee* assigned the decree and all rights under it to *Girenderchunder Ghose*, the son of *Anundonarain Ghose*, in consideration of the money lent to discharge the arrears, in whose place subsequently the Appellants, the sons of *Anundonarain Ghose*, were substituted, and who have all the rights that *Gourmonee Dossee* possessed.

When execution was sought to be enforced against *Kaminee Dossee*, by a sale of the whole *Talook*, the Respondent, *Sreemutty Dossee*, the daughter of *Hurrololl Mitter*, and the mother of his two grandsons, intervened to prevent the sale of the entirety, insisting that as *Kaminee Dossee* was a childless widow, the son of *Sreemutty Dossee*, who was then a minor, had a reversionary interest in the *Talook*, which could not be sold to pay a personal debt of *Kaminee Dossee*. When the intervention took place, it appears that then, for the first time, the holder of the decree raised the claim that as the *Talook* in its entirety had been saved from sale by the payment of the arrears of the revenue, the *Talook* in its entirety was liable to be sold in order to obtain repayment of that amount.

This question was brought before the Principal *Sudder Ameen* in *March*, 1856. He was of opinion that, under that decree, the claim could not be

1867.

NUGENDER-
CHUNDER
GHOSE

7.
SREEMUTTY
KAMINEE
DOSSEE.

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

maintained. He refers to a case, in the *Sudder Dewanny Adawlut*, a decision of the 16th of *May*, 1841, *Rajah Hurrendronarain Roy*, p. 8, which determines that a decree against a Hindoo widow cannot be executed against the estate of her deceased husband, except when it is clearly specified in the decree, that the estate is liable for it. The case, when referred to, fully bears out this construction. The words of the judgment are these:—"The decree is against *B* for herself—not against *B* as guardian of *C*, then a minor. *B* had only a life estate as widow, and the family property is not liable to sale for the personal debts. Whether this was originally a personal debt has not been judicially determined. But the decree as it stands is against *B* personally, and can issue only against her and her heirs. *C* is not her heir, and the family property is not her property, nor can that property be held liable till a decree be given for it."

The result of his decision was, that the application to make the *Talook* generally liable to pay the debt was refused, on the ground that the question could not be taken into consideration in an execution case, but that the question ought to be determined in a civil action. This Order was affirmed on appeal. Shortly after this the present Appellants were substituted for *Girenderchunder Ghose*; and thereupon in *August*, 1859, the suit was instituted out of which the present appeal has arisen. It was instituted by *George Smoult Fagan*, who had been intermediately appointed Receiver of the estate of *Anundonarain Ghose*, deceased. The plaint in this suit is in the following terms:—

"The particulars of the case are these:—The

Defendant, *Gourmonee Dossee*, borrowed a sum of money from the estate of *Anundonarain Ghose*, deceased, to pay the rent or *Talook*, No. 109, *Turuff Kalikapore* and others, as per the *touzee* of the Collectorate of this *Zillah*, the annual *Sudder jumma* of which is Rs. 25,730. 3¼, for the protection of her interest as mortgagee of the *Talook*. For the recovery of the said sum of money, she obtained a decree from this Court in suit No. 97 of 1851, against the Defendant, *Kaminee Dossee*, which decree the decree-holder, *Gourmonee Dossee*, transferred to *Govind Chunder Ghose*, the then Receiver to the estate of *Anundonarain Ghose*, under a deed of conveyance executed on the 17th of *February*, 1855, in lieu of the money due from her to the said estate. When, consequent on the execution of the decree by the said Receiver, a proclamation for the sale of the *Talook* was issued, objections were raised by *Sreemutty Dossee* and the fictitious *Putneedars*, Defendants, whereupon, by a summary Order passed on the 18th of *March*, 1856, the sale of the *Talook* was stayed. Hence has arisen the cause of this suit. I, as the present Receiver to the estate of *Anundonarain Ghose*, bring this suit to recover the amount of the said decree, together with interest and costs according to the scale below furnished."

But this plaint does not seek to obtain a determination that the money paid for the arrears of the revenue constituted a charge upon the *Talook*; all that it does is to constitute a suit to recover the amount of the decree, with interest and costs, and to have the *Talook* sold for that purpose. The manner in which this is put by the Judge of the Civil Court is, that the suit is, by the agreement of all parties, wholly

1867.
 NUGENDER-
 CHUNDER
 GHOSE
 v.
 SREEMUTTY
 KAMINEE
 DOSSEE.

1867.

NUGENDER-
CHUNDER
GHOSEv.
SREEMUTTY
KAMINEE
DOSSEE.

contingent on the decree obtained in the first suit. He states that the decree "was not one in restriction of the remedies open to the Plaintiff, so as to confine the decree-holder to remedies personal to *Sreemutty Kaminee Dossee*; she was in possession of the estate. The action was brought against her in that character and capacity, and the law makes the proprietary interest responsible for any sums advanced to protect an interest in the estate. The decree being passed upon the recitals in the plaint, that cannot now be impeached upon statements that no mortgage existed; we must take the fact as found, the case having gone to decree against *Kaminee Dossee*, as the party in possession of the estate."

The Judge then proceeds, after showing that the action was one not merely personal against *Kaminee Dossee*, but that it also bound her, in her character as possessor, to answer all the issues in favour of the Plaintiff with costs, as between the Plaintiff and *Kaminee Dossee* and *Sreemutty Dossee*. From this decree an appeal was preferred to the High Court of Judicature, when, on the 13th of *December*, 1862, a decree was pronounced reversing the decision of the Court below. It is important to observe that in the opinion of the Judges of the High Court they had not to decide the question whether, by payment of the revenue in arrear, the person who had such an interest in the *Talook* as to entitle her to pay the arrear, and who thereby saved the *Talook* from being sold, did not thereby acquire a lien or charge on the *Talook* to the extent of the money so paid and interest thereon, but that the question they had to decide was simply and merely whether that equity could be enforced in a suit brought under the provisions of section 9 of

Act, No. 1 of 1845, which was confined to the object authorized by that section, and which did not proceed against the persons who had an interest in the property in succession after the death of the widow in possession. This will appear plain by the passage in the judgment, which is to this effect, viz., "the only point which we have to determine in this appeal is, whether as the decree in the suit brought against *Kaminee Dossee* by *Gourmonee Dossee* for the recovery of a sum of money paid to protect her own interests as mortgagee, and to save the estate on which she held the mortgage from sale, though personal in its terms against *Kaminee Dossee*, does or does not, under section 9, Act, No. 1 of 1845, give, to use the Judge's terms, 'to the decree-holder a statutory lien on the estate.' Were the case one of first impression, we should even then have little hesitation, looking to the plain terms of the law, which simply gives a right of action against the proprietors of the estate, in declaring that the decree in a suit brought under the section of the Act above cited is only a personal one, and gives no equitable lien on the estate to the decree-holder, so that the property itself, in the hands of the person on whose account the payment was made, or any purchaser from him, is liable for the amount decreed."

They then proceed to point out a distinction between the case cited by the Respondents in that appeal and the present case, and they decide that the decree against *Kaminee Dossee* was a personal one against her, and that consequently the action of the Court in execution must be confined to her interest in her husband's interest in the estate, and that the rights of *Kaminee Dossee's* husband in the estate, or the por-

1867.

NUGENDER-
CHUNDER
GHOSE

v.
SREEMUTTY
KAMINEE
DOSSEE.

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

tion of the estate upon which an equitable lien was acquired, cannot be brought to sale. They, therefore, reverse the decision of the Court below, and allow the appeal of *Sreemutty Dossee* with costs. Upon the fullest consideration that their Lordships have been able to give to this case, they are of opinion the Judges of the High Court came to a correct conclusion as to the construction of section 9 of Act, No. 1 of 1845, and that the decision of the High Court was correct, and ought to be affirmed.

They repeat that it is not, in their opinion, the question whether the person who pays the arrear of the revenue does not acquire thereby a charge on the *Talook* which he saves from sale, but whether, if he seek to enforce that right, he must not do so in a suit properly framed for that purpose, and not merely in a suit which is confined to a personal remedy against the person in possession of the *Talook*. If the person who so pays the arrears of revenue seek repayment only under the 9th section of Act, No. 1 of 1845, as against the person in possession of the *Talook*, who has but a limited interest therein, and confines his suit to that object, their Lordships concur with the opinion of the High Court that the decree so obtained against the person in possession can only be made effectual against the property of that person, including such interest as she had in the *Talook*.

That this was the character of the suit in this case originally is shown by the pleadings in the case, and by the observation of the *Zillah* Judge in the passage already cited.

That the present suit, in which this appeal is presented, was only one supplemental to the original

suit, and brought to enforce and extend the decree so obtained, is also shown by the consideration of the plaint itself, and observations already cited of the *Zillah* Judge in pronouncing this decree, which fact is confirmed by the observation of the Judges in the High Court. Their Lordships think that it is impossible for them, in a case where the Respondents do not appear, to upset a decision of the High Court, which, in substance, only affirms that an action brought under section 9 of Act, No. 1 1845, is only a personal action, and that in an action which was personal against *Kaminee Dossee*, as the possessor of the *Talook*, only her property and her interest in the *Talook* can be affected, and that an equity which the Plaintiff possessed, and which she might have enforced against the owners in reversion also, cannot be enforced against them in a suit brought to extend and enforce a personal decree obtained against the possessor of the limited interest.

Their Lordships wish it to be understood that they leave unimpaired the general rule that in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindoo widow is the proprietress, she will, as Defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. In the present case she is charged by the Plaintiffs with having sought to destroy the estate by causing it to be sold for arrears of revenue. If such a charge be true, the reversioners are entitled to recoup out of her life profits, the money which is advanced to avert a sale, if they redeem, as they are entitled to do, the actual salvors; and it would be obviously

1867.

NUGENDER-
CHUNDER
GHOSEv.
SREEMUTTY
KAMINEE
DOSSEE.

1867.

NUGENDER-
CHUNDER
GHOSE

v.

SREEMUTTY
KAMINEE
DOSSEE.

inequitable for a person with such knowledge of the dealings of the proprietress, determining to salve the estate, to seek indirectly its destruction by a sale of the whole estate under an ordinary execution, without giving the reversioners the means of protecting their interests, by making them parties to a suit the object of which, by a mortgagee who advances to save the estate, should properly be to have an additional charge declared in his favour on it, subject to redemption, and in default only of redemption seeking a sale.

Their Lordships, therefore, will humbly advise Her Majesty that the appeal ought to be dismissed.

SEETUL PERSHAD

...

... Appellant,

AND

MUSSUMAT DOOLHIN BADAM KON-
WUR and others

...

... Respondents.*

*On appeal from the High Court of Judicature at
Fort William, Bengal.*

19th & 20th
Feb., 1867.

It is necessary that a Plaintiff who sets up a *Mookternamah*, purporting to have been executed by a Hindoo widow, appointing a *Mookter* to do

certain acts on her behalf, should establish such instrument by strict legal proof of its due execution. The absence of such proof is not compensated by any legitimate conclusions to be drawn from the other facts and circumstances in the case.

THIS suit was brought by the Appellant to recover, first, the sum of Rs. 20,99,78. 15. 8, which amount comprised the sum of Rs. 1,98,000 for principal and interest, alleged to be due under a *Kistbundy*, or

* Present :—Members of the *Judicial Committee*—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

instalment Bond, said to have been executed by one of the Respondents, *Hazaree Lall*, as the *Mookter* of the principal Respondent, *Mussumat Doolhin Badam Konwur*, under an alleged *Mookternamah*, or power of Attorney, dated the 13th of *March*, 1861; and secondly, to recover the further sum of Rs. 11,978. 15. 8 as principal and interest for moneys said to have been advanced by the Appellant on account of Government revenue to save from sale the *Talook*, *Rooppoor*, in possession of the principal Respondent, a Hindoo widow.

The question in the suit was one of fact; depending on the evidence as to the due execution of a *Mookternamah*, alleged to have been executed by the Respondent, a *Purdah nushen* (secluded in the *Zenana*), of the existence of which it was insisted on behalf of the Respondent that she knew nothing, or of the *Kistbundy*, or certain other transactions, alleged to have been executed by the *Mookter*, under such power of Attorney. Mr. *Tucker*, the Judge of the Civil Court of *Shahabad*, before whom the case was heard, made a decree in favour of the Appellant. In the judgment Mr. *Tucker* stated, that, although he was of opinion that there was a deficiency of strict legal proof of the *Mookternamah*, if such document stood alone, yet he considered that that deficiency of proof was owing to the conduct of the principal Respondent; that the other documentary evidence in the suit substantiated the justice of the Appellant's claim, which was inconsistent with the defence set up by the principal Respondent. Upon appeal the High Court of Judicature, consisting of Messrs. *H. T. Raihes* and *W. S. Seton Karr*, reversed the decree of the Court of first instance on the ground that the alleged execution of the *Mook-*

1867.

SEETUL
PERSHAD

v.

MUSSUMAT
DOOLHIN
BADAM
KONWUR

1867.

SEETUL
PERSHAD
v
MUSSUMAT
DOOLHIN
BADAM
KONWUR.

ternamah and instalment Bond by the principal Respondent was not legally proved, and they were of opinion that the absence of that legal proof was not compensated by any legitimate inferences arising out of other parts of the case. Hence this appeal.

The appeal, which was confined to the question of fact, namely, the genuineness of the *Mookternamah*, was argued by

Sir *R. Palmer*, Q.C., and Mr. *Pontifex*, for the Appellant, and

Mr. *Leith*, for the first Respondent.

Their Lordships' judgment was delivered by

The Right Hon. Lord ROMILLY:—

27th July,
1867.

This is an appeal from a decree of the High Court of Judicature at *Calcutta*, which reversed the decision of the Civil Court of *Shahabad*. The question to be decided in this case is the validity or invalidity of a *Mookternamah*, appearing to have been executed by the Respondent in favour of *Hazaree Lall*. The case, as stated by the Appellant, is to this effect:—

Five brothers, of the name of *Pershad Singh*, had been owners of a *Talook* in the *Zillah* of *Shahabad*, called *Talook, Rooppoor*. One of them, *Kalee Pershad Singh*, died, leaving surviving him the Respondent, *Mussumat Doolhin Badam Konwur*, his widow.

Kishen Pershad Singh, one of the surviving brothers, was the manager.

The *Rajah* of *Doomrao*, who was connected with the family, the Respondent being his sister-in-law, obtained a decree against the co-sharers in the *Talook* for money borrowed from him by *Kishen Pershad Singh* to pay the revenue in arrear. This decree bore date the 23rd of *December*, 1852. Before

1860 the Appellant, *Seetul Pershad*, had obtained a decree in like manner against the co-sharers of the *Talook*, and another creditor, named *Ram Pertab Singh*, had obtained a third decree. No steps were taken to enforce these decrees until 1860. In the early part of that year the *Rajah* of *Doomrao* obtained an order for the sale of the *Talook* to satisfy his decree; but prior to the sale he purchased the two other decrees obtained against the co-sharers of the *Talook*.

1867.
SEETUL
PERSHAD
v.
MUSSUMAT
DOOLHIN
BADAM
KONWUR.

The *Talook* was sold on the 2nd of *July*, 1860, and the *Rajah* of *Doomrao* was the purchaser, at the sum of Rs. 64,000. Thereupon the Appellant alleges that an agreement took place between the Respondent, *Badam Konwur*, and the *Rajah* of *Doomrao*, by which she was to be put into possession of the *Talook* in the following manner, viz.:—That the Respondent, *Badam Konwur*, was to execute the *Mookternamah* in question, appointing *Hazaree Lall*, who was a servant of hers, her *Mookter*, to borrow Rs. 180,000 from the Appellant, to be paid to the *Rajah* of *Doomrao*; that thereupon the *Rajah* was to execute an *Utlanamah* of the *Talook* in favour of the Respondent; that then *Hazaree Lall* was to execute a *Kistbundy*, or instalment Bond, on the part of the Respondent, and to deliver this to *Seetul Pershad*, the Appellant; and, finally, that a farming *Pottah*, on the part of the Respondent, was to be executed in favour of *Mussumat Doolhin Champa Konwur*, at a rent of Rs. 19,000 per annum for forty-six years, of which rent Rs. 14,725 were to be applied in payment of the Government revenue, and Rs. 4,000 for the liquidation of the principal amount of the instalment debt. The total amount of this is

1867.

SEETUL
PERSHAD
v.
MUSSUMAT
DOOLHIN
BADAM
KONWUR.

Rs. 18,725, which would leave a balance of Rs. 275 for the Respondent.

The Appellant further alleges, that upon this arrangement being come to, and for the purpose of carrying it into execution, the three instruments were executed, viz., the gift of the *Talook* to the Respondent, the widow; the lease to the Respondent, *Champa Konwur*; and the *Kistbundy*, or instalment Bond, in favour of the Appellant; and that the amount of Rs. 180,000 was paid to the *Rajah* of *Doomrao*, or the amount was accounted for to him, by *Seetul Pershad*, who acted as a general Banker, and was also the Treasurer of the *Rajah* of *Doomrao*.

The Appellant further alleges, that *Champa Konwur*, the lessee, entered into possession of the *Talook*, paid the first monthly instalment to the Appellant, but paid nothing more; thereupon the Appellant paid the Government revenue, and instituted this suit to recover against the Respondent the sum of Rs. 198,000 for principal and interest on the debt due to him, and also the amount paid by him for Government revenue, with interest. Such is the account of the transaction given by the Appellant, and sought to be established by the evidence produced. The Respondent denied that she ever granted or executed any *Mookternamah* to *Hazaree Lall*, or to any other person. Whether she had or had not executed this *Mookternamah* was the first and, indeed, the only material issue settled for adjudication in this case.

In support of the Appellant's case, the instrument itself was produced, purporting to be signed by the Respondent, and to be attested by three witnesses, *Bhojawun Singh*, *Rooghoonath Singh*, and *Baboo*

Hurrechurn Singh, and to be signed, sealed, and registered by the *Kazi* of *Chainpoor*. The Appellant called, as a witness, the *Kazi* himself, from whose deposition it appears that the instrument was brought to him by *Hurrechurn Singh*, ready executed, and attested by *Bhojawun Singh* and *Rooghoonath Singh*, both of whom accompanied him on that occasion. The *Kazi* deposes that *Hurrechurn Singh* told him the reasons why the instrument had been executed by the Respondent; but he does not state that *Hurrechurn Singh*, or either of the two witnesses who had then attested it, represented that he had been present at the execution of it. The *Kazi* further deposes that he knew *Hurrechurn Singh* of old, and, therefore, he caused his attestation on the *Mookternamah* to be made in his (the *Kazi's*) presence. *Hurrechurn Singh*, on whose representation the *Kazi* seems to have relied in registering the instrument, was not produced as a witness in the cause. The Appellant alleged that he was kept out of the way intentionally to defeat his (the Appellant's) claim, but no evidence was adduced in support of that allegation. *Bhojawun Singh*, one of the witnesses to the instrument, was summoned as a witness by the Appellant; and a person answering to that name appeared before the Civil Court; but he declared that he was unable to read or write, and that he knew nothing about the *Mookternamah*. This person having been confronted with the *Kazi*, the *Kazi* declared that he was not the witness who had appeared before him. The real witness, *Bhojawun Singh*, was not produced.

The remaining witness, *Rooghoonath Singh*, stated that he could not read or write, and denied that he

1867.
SEETUL
PERSHAD
v.
MUSSUMAT
DOOLHIN
BADAM
KONWUR.

1867.

SEETUL
PERSHAD
v.
MUSSUMAT
DOOLHIN
BADAM
KONWUR.

had attested any *Mookternamah*. Steps were taken to confront the *Kazi* with this witness, for the purpose of identifying him, but without success. The Appellant says that the witness had absconded to avoid identification. Neither the Appellant nor the Respondent produced or examined *Hazaree Lall*, the supposed *Mookter*. The Appellant states that he made every effort to do so, but ineffectually, and he suggests that *Hazaree Lall* was kept out of the way by the Respondents, whose servant he was. It is stated in the judgment in the High Court of Judicature, that he was forthcoming after the decision of the case in the Civil Court, but no attempt was made on either side to produce him for examination when the case was heard on appeal.

In the circumstances above stated, the Judge in the Civil Court disregarded the absence of legal proof of the execution of the *Mookternamah* by the Respondent, and considering that the rest of the evidence afforded the strongest presumption of its genuineness, gave a decree in full to the Appellant. On appeal to the High Court of Judicature this judgment was reversed, the Court finding that the execution of the *Mookternamah* was not proved, and that the absence of legal proof was not compensated by any legitimate inference arising out of, or by any facts disclosed by, the other parts of the case.

With this opinion their Lordships concur. They agree with the learned Judges of the High Court in considering the whole of the transactions relative to the sale and subsequent gift of the *Talook*, in respect of which the loan was incurred, as transactions of a very questionable character.

The claim is made for 2 lacks and Rs. 9,978; this amount includes the payments of the Government revenue, yet the property was sold by auction for Rs. 64,000. The Judge in the Civil Court considered the discrepancy in value between Rs. 64,000, the amount of sale, and the Rs. 1,80,000, the amount of the loan, as evidence that the sale was collusive; but their Lordships see no reason to assume that one sum more than the other represents the real value of the *Talook*. The Judges of the High Court considered all this a mere paper transaction, without any real transfer of property. The following circumstances in the case may be referred to as confirming this view. The decree of the Civil Judge in favour of *Seetul Pershad* includes the payment of the Government revenue, but the receipts produced are given in the name of *Kishen Pershad Singh*, the Manager of the co-sharers. It appears that no change of name has taken place in the Collector's Books, and that *Kishen Pershad Singh* remains now, as he has heretofore been, the person liable to pay the Government revenue, and to whom the receipts for payment are given. This circumstance affects seriously the argument on which the Appellant mainly relied, viz., the fact that the Respondent is in the possession of the estate, and that this is not disputed by her; but if this possession is merely nominal, it is consistent with the view taken by the High Court, that the whole matter is nothing more than a paper transaction, while the actual *bonâ fide* possession of the Respondent is inconsistent with the absence of any change of name in the Books of the Collector, and with the Government revenue being still paid by *Kishen Pershad Singh*.

1867.

SEETUL
PERSHAD
v.MUSSUMAT
DOOLHIN
BADAM
KONWUR.

1867.

SEETUL
PERSHAD

v.

MUSSUMAT
DOOLHIN
BADAM
KONWUR.

In addition to this, the decree taken by consent in 1852; the purchase of the other decrees, one from the Appellant and the other from a stranger; the delay in enforcing them; the circumstance that *Hazaree Lall* was the *Mookter* of *Kishen Pershad Singh*, and of all the co-sharers; that the Respondent, as well as *Champa Konwur*, the person to whom the lease of the *Talook* is granted, are ladies secluded in the *Zenana*, and never appearing in public,—all are circumstances which cast a grave suspicion on the case, and tend to support the suggestion of the learned Counsel for the Respondent, which also seems to have been adopted by the Judges of the High Court, viz.: that the whole transaction was a scheme concocted between the *Rajah* of *Doomrao* and *Kishen Pershad Singh*, to whom he was allied by marriage, to make it appear that the estate had been bought by the *Rajah*, and that it did not belong to the *Pershad Singh* family, while the real ownership and possession were to remain unaltered.

The *Mookternamah* itself is taken to be registered by the *Kazi* and not by the English Resident at *Agra*, as the other deeds were. The witnesses to the instrument itself are three; two of them are unable to sign their own names, and, therefore, their attestation is worth next to nothing; the third, *Baboo Hurrechurn Singh*, only signed the instrument at the request of the *Kazi*, and does not pretend to have been present when the Respondent signed. In truth, there is no attempt whatever to prove the signature of the Respondent herself by any one present at the time of such signature.

On the review of all the circumstances of the case, their Lordships concur in the opinion expressed by

the Judges of the High Court of Judicature, that there is no legal proof of the execution of the *Mookternamah*, and that the absence of such proof is not compensated by any legitimate inferences to be drawn from the other facts disclosed in this case. Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal, with costs.

1867.
SEETUL
PERSHAD
v.
MUSSUMAT
DOOLHIN
BADAM
KONWUR.

LALLA NARAIN DOSS ... Appellant,

AND

The estate of the Ex-King of *Delhi*
(in possession of the Government of *India*) ... Respondent.*

On appeal from the Court of the Judicial Commissioner of the Punjaub.

THE Appellant in this case was a Banker, carrying on business at *Delhi*, and brought the present suit to establish his claim for principal and interest due on

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

against the Ex-King of *Delhi*, or his estate, were to be heard and adjudicated upon by the ordinary judicial Tribunals of the British Government, with the view of the Government eventually paying such claims as might be proved, out of his estate in possession.

Under this Order, where a claim was made and was justly and fairly substantiated against the Ex-King in the investigation before the Judicial Commissioner, held that such claim ought to have been allowed

10th July,
1867.
By an Order of the Governor-General of *India* in Council, dated the 21st February, 1860, claims of loyal subjects of the British Government

1867.

LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

a Bond for Rs. 35,882. 10a., executed by the Ex-King of *Delhi* in favour of the Appellant's father, *Ramjee Mull*, otherwise *Ramjee Doss*, on account of certain money transactions between the Ex-King of *Delhi* and the Appellant's father.

The suit was brought under an Order by the Governor-General of *India* in Council, of the 21st of *February*, 1860, which directed all claims of royal subjects of the British Government against the Ex-King, or his estate, to be heard and adjudicated by the ordinary judicial Tribunals of the British Government, with the object of the Government eventually paying such claims as might be proved out of his estate in their possession.

In 1858, after the mutiny had been put down and order established, the Governor-General in *India* in Council placed the *Delhi* territory (except a small portion) under the administration of the Chief Commissioner of the *Punjaub*, then a non-Regulation Province of British *India*. In consequence, Reg. V. of 1832, which had previously annexed the *Delhi* territory to the jurisdiction of the Courts of the North-Western Provinces at *Agra*, was repealed by Act, No. XXXVIII. of 1858.

The facts of the case were as follows:—

Previous to the year 1840, *Mahomed Bahadoor Shaw*, the Ex-King of *Delhi*, resided as a State pensioner in his Palace within the fort of *Delhi*, and he

irrespective of technical difficulties which might have attended legal proceedings against the Ex-King to recover the debt during his Sovereignty.

Government, in cases in which it has taken upon itself to provide payments of debts claimed against the estate of the Ex-King, when such claims are barred by Regulation or Act, is entitled to the benefit of the rule of limitation barring the claim, but

Semle—The Regulations of Limitation do not apply in the circumstances of the position of the Ex-King, where a suitor had been denied justice under a plea of jurisdiction and exemption.

continued to reside there until he was removed as a Prisoner by the British Government, when his property, real and personal, including his private estate, was seized and appropriated by the Government.

Ramjee Mull, the father of the Appellant, resided in *Delhi*, and carried on the business of a Banker there, in which character he had money transactions with the Ex-King. On the 10th of *April*, 1840, an account was taken, and there was then found due and owing from the Ex-King to *Ramjee Mull* in respect of some such transactions, including both principal and interest, the sum of Rs. 29,982 5a. The Ex-King, being in want of more money, and being desirous of raising it by a loan, applied to *Ramjee Mull* to advance and lend to him the further sum of Rs. 5,900 5a. 10p.; and at the same time agreed, if he would do so, to give him a Bond, to secure the repayment, with interest, not only of that sum but also the balance of the previous account then due as aforesaid. The Ex-King also agreed to give to *Ramjee Mull*, by way of collateral security, an Order of Colonel *Skinner*, since deceased, and then the lessee of certain lands held by him of the Ex-King, to pay by instalments, out of the rent of his *Jaghire*, the money to be lent and secured by the Bond. *Ramjee Mull* assented to this; and accordingly advanced to the Ex-King, on the 15th of *April*, 1840, the sum of Rs. 5,900 5a. 10p. The Bond in question was then written out, by *Dewan Dhoonkul Singh*, the confidential Minister of the Ex-King, and sealed by the latter, and delivered to *Ramjee Mull*, on payment of this amount.

Ramjee Mull, during his lifetime—and after his death the Appellant, up to the year 1850—received annually from Colonel *Skinner*, the lessee mentioned

1867.
 LALLA
 NARAIN DOSS
 v.
 THE ESTATE
 OF THE
 EX-KING OF
 DELHI.

1867.

LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

in the Bond, sums of money, varying in amount, in part payment of the loan; but the whole of the principal moneys secured by the Bond, as well as arrears of interest, remained due to the Appellant in the year 1850. In that year the Ex-King applied to the Appellant to make him another advance and loan of money, which the Appellant refused to do, on the ground that he had not been repaid the former loan. It appeared that the Ex-King resented this refusal, and accordingly, at the last-mentioned date, issued an Order to Colonel *Skinner* not to pay any more money to the Appellant, which Order was complied with. The Appellant then petitioned the Ex-King to pay him the whole amount then due under the Bond, but without any success.

In the year 1852 it appeared there was remaining due in respect of the debt the sum of Rs. 36,000 for principal and interest; when the Appellant brought a suit against the Ex-King, to recover the same, before Mr. *Morgan*, the Civil Judge of *Delhi*. This suit was, however, thrown out on its being proved that the Ex-King had contracted the debt within the Palace and Fort. On that ground the Judge held that he was not amenable to the Court's jurisdiction, the Fort being considered and treated by the Court as if it had been a Foreign State.

The Appellant was unable to obtain any further payment from the Ex-King in respect of the Bond, and the whole of the principal and considerable accumulations of interest remained unpaid when the mutiny broke out. The Appellant's property, papers, and securities for money were all then plundered and carried off by the rebels and mutineers, and his

accounts and Books, in which were entries of the moneys received by him on account of interest, were all either lost or destroyed during the mutiny, and in the disturbances in *Delhi*. On the establishment of the British power part of the Appellant's property was recovered by the Prize Agent, Captain *Law*, by whom, on the Appellant's loyalty to the British Government having been proved, the Bond in question was restored. Afterwards the Governor-General of *India* in Council seized and appropriated the property of the Ex-King, and published, in 1860, the before-mentioned Order, authorizing all claims of loyal British subjects against the Ex-King to be heard and adjudicated upon by the ordinary judicial Tribunals of the country.

On the publication of this Order, the Appellant lodged a petition of claim, which stated that the claim was made against the estate of the Ex-King of *Delhi*, for money lent to him, amounting, principal and interest, to the aggregate sum of Rs. 80,824 13a. 3p., calculated up to the 3rd of *February*, 1860; that the Plaintiff held a Bond, signed and sealed by the Ex-King, and bearing the signature of Mr. *Morgan*, the Judge of *Delhi*, before whom he had brought the suit on the Bond; that for some years the Appellant had received payments on account of interest from Colonel *Skinner* on behalf of the Ex-King; that he claimed payment, not from the pension, but from the private estate of the Ex-King, which then yielded an annual revenue of about two lacks of rupees; and the Appellant submitted that, as a lawful creditor of the Ex-King, he was entitled to have his claim satisfied out of that estate. The petition then prayed that the claim might be

1867.
LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

1867.

LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

investigated, as directed by the late Lieutenant-Governor of the *Punjaub*, and the amount due paid to the Appellant; and he submitted that in so paying him the Government would incur no loss, because the private estate of the Ex-King was more than sufficient to meet all lawful claims against him.

The Appellant filed a letter in Court, as supplementary to his petition, correcting the former account, which set forth the principal points in his case which he relied on. First, that the Bond which he submitted bore the seal of the Ex-King; secondly, that it bore the signature of Mr. *Morgan*, late Civil and Sessions Judge of *Delhi*, before whom he instituted a claim, under the Bond, of Rs. 36,000 against the Ex-King; and thirdly, that it bore the signature of the Stamp Officer by whom it was stamped previous to being admitted in Court as a legal document.

The account last mentioned showed a balance of Rs. 75,258 13a. 3p., of which Rs. 36,000 was claimed as principal, instead of Rs. 80,824 13a. 3p. mentioned in the petition of claim, as due to the Plaintiff from the estate of the Ex-King on 21st of *July*, 1860.

The Appellant was personally examined on oath by the Assistant-Commissioner, *L. Berkeley*, Esq., in support of his claim, when, after deposing to the amount due and owing to him, he deposed to the fact that all his papers and Books were lost in the mutiny, but that he had recovered the Bond from Captain *Law* in manner aforesaid. He filed the Bond and examined six witnesses. The two first were his own *Gomastahs*, who had been long employed in his banking business. These witnesses

proved the transaction relating to the Bond ; the consideration for the same ; the Order of the Ex-King on Colonel *Skinner*, and as to the receipt thereunder by *Ramjee Mull* and the Appellant of not more than Rs. 31,000 or Rs. 32,000 on account of the interest aforesaid ; and lastly, the suit brought on the Bond in 1852, to recover the sum of Rs. 36,000 then due to the Appellant under the same. The second of these witnesses proved that he had entered in the accounts, in the course of his duty as such *Gomastah*, in the Bank, whatever sums of money had been received on account of such interest ; and that all these accounts, and the Books of account, had been destroyed during the mutiny. The two next of the witnesses were persons who had been employed in the office of Colonel *Skinner*, then deceased ; and they proved that instalments of different amounts were paid, under the Ex-King's Order, by the late Colonel *Skinner* to *Ramjee Mull*, and after his death to this Appellant, up to the year 1850, and to an aggregate amount of about Rs. 30,000 or Rs. 31,000, on account of interest, but that nothing had been paid on account of principal ; and that the Ex-King had subsequently sent another Order to Colonel *Skinner*, prohibiting the payment of any more instalments, because His Majesty had asked the Appellant to lend him more money and had been refused. The remaining witnesses were the Record-keeper of the Judge's officer, and the *Serishtadar* of the same office, who proved that the first suit was brought by the Appellant against the Ex-King in the Court of the Judge of *Delhi*, in 1852.

On the 8th of *December*, 1862, the Assistant-

1867.

LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

1867.

LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

Commissioner delivered judgment in the suit, in which, after stating the principal moneys sued for to be Rs. 36,000, the interest Rs. 37,208 13a. 3p. and the miscellaneous charges Rs. 2,050, making the aggregate claim Rs. 75,258 13a. 3p., he proceeded as follows :—

“ The Plaintiff sues for the above amount, and says the late Ex-King of *Delhi* was indebted to his father Rs. 35,882 10a., for which he holds a Bond, dated 13th of *April*, 1840, bearing interest at 12 per cent. In payment of this debt he received nothing towards the principal, but realized Rs. 32,000 for interest only up to 1850, when the Ex-King ceased all payments, in consequence of which, in 1852, he sued in the Judge's Court for Rs. 36,000. The claim was, however, thrown out, as the late Ex-King was not amenable to the Civil Court. The Plaintiff was required to prove, first, his loyalty; and second, that the amount claimed is due. To the first point he has produced authenticated testimonials which establish his loyalty beyond a doubt. It seems that on account of this debt, and for giving protection to Dr. *Dopping*, that he suffered at the hands of the Ex King and mutineers. To the second point he has produced the original *Sooka* or Bond which he holds from the Ex-King, which was legalized by being stamped by the Collector before it could be admitted in evidence. He could, however, bring no account Books, as they were destroyed during the late mutiny, with his property; but he has produced two witnesses to execution of Bond, two to prove that Rs. 32,000 only was realized through the late Colonel *Skinner* up to 1850 for interest, after which all payments ceased; and, lastly, two wit-

nesses to prove that the claim was thrown out by the Judge on account of jurisdiction. I consider the Bond of Plaintiff a reliable document, but there are no papers or Books forthcoming from which the amount actually realized could be estimated, and no other witnesses could, under the circumstances, be given. Two of them are retainers of the late Colonel *Skinner*, through whom Rs. 32,000 was paid to Plaintiff; two, again, are Plaintiff's *Gomastahs*, who kept his accounts, and who assert that more than Rs. 32,000 was not realized; the last two witnesses are the *Serishtadar* and the Record-keeper of the Judge's Court, who testify to Plaintiff's claim being instituted and thrown out on account of jurisdiction. The Plaintiff is a person of great respectability and standing, and I hardly think (judging from his position and character) that he would bring an unfounded action. It may, therefore, be assumed, that as he sued for Rs. 36,000 in 1852, the amount was then actually due, which I would recommend his receiving, with Rs. 1,000 for cost of suit. With regard to interest, which Plaintiff insists on obtaining, firstly as a right; secondly, on the score of loyalty; thirdly, on account of his losses during the mutiny, I would leave the Government to decide, as I have not awarded it in any other case, on the principle that the Government have, as a favour, taken on themselves to adjust the reasonable and just demand of the Ex-King's creditors, and the Plaintiff has already received Rs. 32,000 for interest on his debt. I, therefore, recommend the principal amount only."

This judgment was then laid before the Commissioner of *Delhi*, Colonel *G. Hamilton*, who sent back

1867.
 LALLA
 NARAIN DOSS
 v.
 THE ESTATE
 OF THE
 EX-KING OF
 DELHI.

1867.
 LALLA
 NARAIN DOSS
 v.
 THE ESTATE
 OF THE
 EX-KING OF
 DELHI.

the proceedings to the Assistant-Commissioner for further inquiry, directing that the Appellant should be questioned as to whether he had ever made any application to the Resident for redress; and whether the claim was settled or rejected by that Officer; and directing also that inquiry should be made respecting the claim of Officers of the Residency, and officials employed under the Ex-King.

Further witnesses were examined, the effect of whose evidence was to prove that the Plaintiff brought his former suit in the Court at *Delhi*, in the regular way, against the Ex-King; that the Resident was not in the habit of hearing such complaints, except from those whom the King might send to him with a *shooka*, or order for the payment of money, and that without such an order the Resident declined to hear, and did not, in fact, hear any complaints, nor were any such preferred to him; and that the Resident did not interfere with the pecuniary transactions of the Ex-King, nor did he hear cases of debt against the King.

On the 16th of *March*, 1853, Mr. *L. Berkeley*, the Assistant-Commissioner, sent to Colonel *G. Hamilton* his written judgment as follows:—"In compliance with your instructions, I have questioned the Plaintiff regarding the circumstances alluded to by you, and taken the evidence of the following witnesses, namely:—*Mirza Ilahee Buksh*, *Hakeem Ahsanalla Khan*, *Mokund Lall*, *Ballmukund*, *Faiseeram*, and *Lalla Mohesh Doss*. The evidence of *Hussn Beg* and *Jugul Kishore*, two retainers of the late Colonel *Skinner*, and of two *Gomastahs* of Plaintiff, was taken before. All the evidence tends to prove the claim, and that Plaintiff

realized only the interest of the principal amount; the Bond was recovered by the Plaintiff from the prize Agents. The Ex-King was not amenable to the Courts for debts contracted within the Palace walls. He was liable to be sued for all other debts, and hence this suit. I find the Resident or Agent to the Governor-General at *Delhi* could only take up those claims which the Ex-King allowed him to do. The Resident had no authority to receive applications for settlement of debts contracted by the Ex-King without the consent of the latter. I have re-considered the case, and abide by my former recommendation, viz.—That the Plaintiff receive the principal of the amount sued for, should there be property forthcoming from which the debt could be satisfied."

The Commissioner, Colonel *J. Hamilton*, afterwards called *Rajah Debee Singh* as a witness; he corroborated the evidence given by the Appellant's witnesses as to the original debt, the execution of the Bond by the Ex-King, his order on Colonel *Skinner*, and also as to payments by him of moneys under that order. He produced the order on Colonel *Skinner*, and was asked how he came to hold it, and he replied :—"I found it in the old papers of the King. At one time the King wished the money in payment of the debts to creditors to be stopped, and got it himself from Colonel *Skinner*."

On the 22nd of *April*, 1863, the Commissioner recorded his judgment as follows :—"The document produced by *Rajah Debee Singh* confirms what I have stated above, and clearly shows that the Ex-King considered that he had finally settled the claims of the Plaintiff. The Plaintiff admits that from 1850 till 1857 he received no money, and

1867.

LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

1867.
 LALLA
 NARAIN DOSS
 v.
 THE ESTATE
 OF THE
 EX-KING OF
 DELHI.

it is, therefore, certain, had the Ex-King now been alive, and *in statu quo*, the Plaintiff would have no better prospect of recovering his claim, supposing it to be quite just. It is the desire of the Government that faithful subjects should not be losers by the attainder of the Ex-King, but it does not profess to make them gainers by that event. I, therefore, dismiss the claim of the Plaintiff."

The Appellant appealed from this judgment to the Court of the Judicial Commissioner of the *Punjab*, and on the 28th of *May*, 1863, the officiating Judicial Commissioner, *Robert Needham Cust*, Esq., by his Order of that date, admitted the appeal. The hearing of the appeal took place before him, and on the 16th of *June*, 1863, he pronounced his decree dismissing the appeal with costs. In his judgment: he said "It is admitted, and willingly admitted, that *Lalla Narain Doss* is a loyal subject and respectable citizen, but that gives no claim to a decree when the proofs are not sufficient. If the Government propose to reward well-wishers, they do so directly by pensions or *jaghires*, and not indirectly by decrees in doubtful cases. It may be possible that *Rajah Debee Singh* was di-loyal. This does not vitiate his evidence in a matter which is within his cognizance. It must never be lost sight of, in the adjudication of this class of cases, that the hearing of any of them or the decreeing of any portion of them, is, on the part of the Government of *India*, an act of mere grace and benevolence—that no legal claim can be made out against Government, either in law or equity. The Court which investigates these cases is one of conscience, and decrees can only issue in those in which it is clear that had the King remained in power the Claimant had some chance of satisfaction.

1867.

LALLA
NARAIN DOSS

v.

THE ESTATE
OF THE
EX-KING OF
DELHI.

It is notorious that money was advanced to the King, as most hazardous speculations upon very uncertain security, at exorbitant interest, and, as it appears in this case, without the guarantee of the existence of a Civil Court competent to redress injuries or breaches of contract. This claim was brought forward in 1860, the Bond is dated twenty years before. It is admitted that since 1850—that is to say, for ten years—no payments of any kind have been made. In 1852 a claim was lodged in the Civil Court of *Delhi*, and rejected for want of jurisdiction; this futile attempt does not affect the Act of Limitations. Six years is the limitation of a bonded debt, and the Appellant was out of Court before the mutiny broke out, as regards the procedure of the *Punjab* Courts. It is notorious that there was an Agent to the Lieutenant-Governor in charge of the King of *Delhi*, and that application might have been made to him in the matter of a debt claimed from the King: the Agent might or might not have been able to do justice, had he been applied to; and not being able to do justice, the inference is, certainly, that the claim is a very doubtful one. A claim which the Agent to the Lieutenant-Governor was unable to support by his recommendation to the King, is not one which can be recommended to the Government of *India* to satisfy, in the place of the King. If no application was made to the Agent, it must be inferred that the claim was not one which the Appellant was willing to communicate to the Agent, and is, therefore, certainly not one which, after a lapse of ten years, can be recommended to be satisfied as an act of grace by the Government of *India*. The Appellant lays great stress on his being a Banker. As a Banker he must know that such things as bad debts

1867.

LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

exist: this is one of them; and the Government does not undertake to satisfy all old Bonds and Book debts which were hopeless before the mutiny. My judgment is not formed on *Rajah Debee Singh's* evidence, but in reply to the Appellant's allegations, that *Rajah Debee Singh* was not examined in his presence. It is asked, why did not the Appellant, when he was examined by the Civil Judge with reference to the matter contained in *Rajah Debee Singh's* evidence, request to be confronted with him? His prayer could have been easily complied with then: he cannot make that objection now."

The Appellant preferred an appeal to Her Majesty in Council, under the Act, No. II, of 1863, which the Judicial Commissioner admitted, and the same now came on for hearing.

Mr. *Leith*, for the Appellant.

As the Plaintiff's case was established by evidence, and as he is admitted to be a loyal subject, the amount sued for by him against the Ex-King's estate ought to have been decreed by the Judicial Commissioner. The period of six years' limitation was erroneously applied by that Officer as a bar to the suit. By the *Punjab* Code, Part I. sec. I. cl. 16, which was in force, at the date of the institution of the suit, the period of limitation was twelve years, calculated from the time when the cause of action arose. The last instalment paid upon the Bond was in 1850, so that twelve years had not expired, and the Appellant was, therefore, entitled to judgment in his favour. By the Act, No. XIV. of 1859, sec. 16, the limitation would be six years if the Bond had not been registered, but if that Act does apply, we are within the pro-

visions of the exception contained in section 24 of that Act. Even if the period of twelve years had really expired, the Appellant was within the exception expressly allowed by the *Punjab* Code, which enacts that, in such cases, if "the Complainant can show that, from minority or other sufficient reason, he has been precluded from obtaining redress, he is entitled to sue," Part II. Procedure, sec. 1, cl. 6. A provision similar to that contained in *Ben. Reg.* III., sec. 14, of 1793. - Here the Appellant did show, by evidence in the suit, that such "sufficient reason" existed, by which he had been precluded from obtaining redress against the Ex-King of *Delhi*, as the Ex-King had availed himself of the plea that his contract under the Bond had been effected within the Fort, so as to exclude the case from the general authority and jurisdiction of the Courts of Law. No laches or neglect can be attributable to the Appellant.

Mr. *Forsyth*, Q. C., and Mr. *Merivale*, for the Government of *India*.

First, the Ex-King of *Delhi*, as a Sovereign power, could not be sued for a debt contracted in the Palace, as a judgment, if obtained against him, could not be enforced; consequently the Government of *India*, who stand in his place, is not under any legal obligation to pay the debt, which under the Order in Council is only a matter of grace and favour on their part. Secondly, the evidence establishes the fact that the alleged debt by the Ex-King was either paid off, or was the personal liability of Colonel *Skinner*; that he paid the amount of principal and interest out of the proceeds of his *Jaghire*, and the judgment of the Judicial Commissioner appealed from was right in so holding; but, thirdly, the right to recover the debt

1867.
LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

Advocate High Court
Jammu & Kashmir
Srinagar.

1867.
 LALLA
 NARAIN DOSS
 v.
 THE ESTATE
 OF THE
 EX-KING OF
 DELHI.

is barred by the law of limitation applicable to the case. The Bond is dated in the year 1840, and the claim against Government is not preferred till the year 1860, a period of twenty years, and, therefore, the suit was barred. It is no answer that the Appellant instituted proceedings in 1852, as he did not sue in a Court of competent jurisdiction; such suit could not take the case out of the operation of the rule of limitation of twelve years.

10th July,
 1867.

Judgment was pronounced by

The Right Hon. LORD CAIRNS.

In the peculiar circumstances of a case of this description, in which the Government of *India* takes upon itself to pay out of the assets of the Ex-King of *Delhi* such claims as can be established against the Ex-King, their Lordships are of opinion, that the Government does no more than what is incumbent upon it, when it narrowly and jealously scrutinizes claims which are made; it being within the experience of all that where the claim is against, not the person who originally contracted the debt, but those who have taken upon themselves the duty of satisfying it, exaggerated and sometimes unfounded demands are made. Their Lordships also think that if in those circumstances a claim were made which was found to be barred by the letter of any Regulation or Act of limitations, the Government of *India* might well say, that they had not taken upon themselves to provide for the payment of State demands, and that they were entitled to the benefit of any rule of limitation of that kind. Subject, however, to these observations, their Lordships think that any claim which justly and fairly, in equity and conscience,

could be made and substantiated against the Ex-King, is a claim to be allowed in the investigation which the Government has instituted before its judicial Officers, irrespective of technical difficulties which might have attended legal proceedings against the King during his Sovereignty, leaving, of course, the question of the payment of that claim, when established, to be dealt with in reference to the assets out of which the payment is to be made.

Now, as to the Bond upon which the claim is made in this case, their Lordships think that the evidence establishes to their perfect satisfaction, as it appears to have established to the satisfaction of the Judges below, the *factum* and the existence of that Bond; and they conceive that no imputation can successfully be made against the Bond as an instrument in the first instance executed by the Ex-King. Their Lordships think that, with regard to the *Punjab* Code as to limitation of actions, it does not apply to the present case, because the claim is made, in their opinion, within the period actually allowed by that Code; and even if there were any doubt as to that, there is amply sufficient reason, from the position of the Ex-King, to account for an action not having been maintained against him within the period prescribed by the rule.

Then arises the question whether the whole amount of principal originally due upon the Bond remains due? No evidence appears to have been adduced tending to show any payment on account of principal. The Officer of the Ex-King, who was examined, by his evidence confirms that which is alleged by the Appellant, viz., that the whole sum remains due, and that nothing has been paid on account of principal. The witness who was last

1867.

LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

1867.

LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

examined, and who produced the documents which passed between the King and Colonel *Skinner*, also by his evidence tends to show that the only payments which were made were the payments through Colonel *Skinner*—payments which, by the very calculation and addition of them, would show that nothing could have been paid on account of principal.

It is said, however, that in the year 1852, when an action was attempted to be maintained against the Ex-King in the Civil Court of *Delhi*, an action which was defeated by the plea of want of jurisdiction, the claim made was a claim for Rs. 36,000 alone. We have not got the proceedings or documents in that action. We have the evidence of the Appellant, who states that what was claimed in that action was the sum of Rs. 36,000. But their Lordships see no reason to doubt that if the claim in that action was upon the face of it described as a claim for Rs. 36,000, that Rs. 36,000 was nothing more than a short and compendious mode of stating the principal sum due upon the Bond. Their Lordships, however, finding that the claim in the action of 1852 was for this sum of Rs. 36,000, and finding also that in the detail of the claim in the present case the principal is taken at that amount, as on the 1st of *January*, 1852, and interest claimed from the 1st of *January*, 1852, only, are of opinion, that while the Appellant is entitled in the present proceedings to recover the amount of the principal of his Bond, he must be content to take his interest as from the 1st of *January*, 1852, until the present time.

Their Lordships, therefore, will humbly recommend to Her Majesty that the decree appealed from should be reversed, and that the Appellant should be

declared to have established his claim for the principal sum appearing on the face of the Bond, with interest from the date that has been mentioned, together with the costs of his litigation in the Courts below, and that he is also entitled to the costs of this appeal.

1867.
LALLA
NARAIN DOSS
v.
THE ESTATE
OF THE
EX-KING OF
DELHI.

RUTTONJI EDULJI SHET ... *Appellant,*

AND

THE COLLECTOR OF TANNA and }
THE CONSERVATOR OF FORESTS } *Respondents.**

On appeal from the High Court of Judicature at Bombay.

THE question in this appeal related to the right of the Appellant, a Parsee Merchant at *Bombay*, in his capacity of *Khote* of the village of *Ghatkopur*, in the Island of *Salsette*, to fell and carry away teak, blackwood, *kheir*, or other unassessed trees growing within the boundaries of that village, as specified in the *Cowl*, or lease, granted to him by the Government

° Present:—Members of the *Judicial Committee*—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colville, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor:—The Right Hon. Sir Lawrence Peel.

which were forest trees, that the lessee could only cut trees growing on the lands demised for the purpose of clearance and cultivation, or for repairs, and that he had no right to fell and carry away for sale unassessed forest timber growing on the demised lands.
Suit by lessee against Government, claiming damages for prohibiting him from cutting forest trees for sale, dismissed.

9th & 10th
July, 1867.
Held, upon
the construction of a Government
Cowl, in *Khote*
tenure (lease
for a limited
period for the
purpose of
cultivation)
of a large
tract of
swamp land,
in the Island
of *Salsette*, in
Bombay, on

1867.
 RUTTONJI
 EDULJI SHET
 v.
 THE
 COLLECTOR
 OF
 TANNA.

for a term of ninety-nine years. The Appellant contended that the Government had no right to prohibit him from so doing, or interfere with him further than by levying tolls or duties for the transit along the public ways of the wood so felled when carried away.

The facts and circumstances of the case were these:—

On the 23rd of *May*, 1843, the Appellant presented a petition to the Government of *Bombay* for a lease of the above village, for the purpose of recovering the swamp land and converting it into salt batty crops, and forming salt pans. Upon this application the then acting Collector of the District of *Tanna* granted to the Appellant a *Cowl* for the village of *Ghatkopur*, bearing date the 31st of *December*, 1845. By the terms of this lease the village was granted to the Appellant in farm from the year 1844, for a period of ninety-nine years, on the revenue of the year 1842, on certain conditions specified in the lease. In the lease the quantity of land was specified, some of which was described as under cultivation and the rest as waste; the number of *brab* trees was likewise specified, amounting to 2,568, of which 82 were on cultivated, and 2,486 on waste land. The first condition provided, that the produce of waste land and waste *brab* trees was to be deducted from the *Jumma-bundy* (revenue settlement or rent), "in consequence of the waste land and *brab* trees having been given to you in *Mafee* (rent free) as specified below." The rent was fixed at Rs. 1,135. 14a. 7p.

The other important conditions in the lease were these:—

2nd clause.—"The waste land of the village, including *Junglegurk*, *Naligurk*, and *Nowsad*, &c., is hereby granted to you in *Mafee* for forty years from

1844-45. You are to make the necessary outlay and bring it under tillage, out of the sweet waste land, one fourth within the term of ten years from the date hereof; and you should in the same manner continue to do so every ten years, so as to bring the whole of it under tillage within that period; in failure whereof the produce of the hay, amounting to Rs. 27 herein deducted, will be collected from you from the first to the last year of the exemption. You are to prepare the salt land for cultivation within five years from 1844-45, but if you fail to do so, a fine of Rs. 500 will be imposed on you, and after the expiration of forty years the full assessment, according to the prevailing usage of the country, will be collected annually from you on such land as may be under cultivation, as well as on such quantity as may remain waste out of the present waste entered in the public accounts."

1867.
 RUTTONJI
 EDULJI SHET
 v.
 THE
 COLLECTOR
 OF
 TANNA.

3rd clause.—"The waste *brab* trees are in like manner made over to you, and after the expiration of forty years they will be surveyed and assessed according to the undermentioned rates, and the amount collected from you."

4th clause.—"You are prohibited from cutting down or destroying any *brab*, date, or other trees, liable to taxation, without the permission of the Collector."

"Should you, during the period of exemption, draw the juice from any trees, and at the expiration of that period allow them to rest with the view of obtaining them at a lower rate, the full tax on all such trees that may have been cultivated by you in any year during the term of exemption will be collected from you."

6th clause.—"The rights of the present pro-

1867.


 RUTTONJI
 EDULJI SHET
 v.
 THE
 COLLECTOR
 OF
 TANNA.

prietors of land, and other privileges of any description whatever, remain unaffected by this lease. It is clearly to be understood that this lease confers no right which Government does not now possess, and only such portion of the rights of Government as may be herein specifically granted is hereby granted to you."

16th clause.—"For breach of any of the conditions of this lease for which a specific penalty has not been laid down, Government is at liberty to inflict such punishment as may be provided by Regulations, and to cancel the lease and resume the village without reimbursing you for any expense you may have incurred. No claim for losses will be attended to."

25th clause.—"Should the inhabitants of your as well as of other villages be in the habit of carrying hay, wood, &c., annually from the jungles of your village, you are not to interfere with such practice."

32nd clause.—"There are in the aforesaid village about 150 *beegas* of swampy land which might be available for salt pans; you are, therefore, as proposed by you in your petition, to expend whatever sums of money may be necessary and convert the said land into salt pans," within a certain period there specified and subject to certain penalties.

It appeared from the evidence of some of the Appellant's witnesses, that on more than one occasion after the granting of the lease, he cut and took away some of the forest timber on land comprised in the lease. In the year 1859 the Appellant put up to auction the right to fell and appropriate all the teak, blackwood, and *kheir* trees in the *Junglegurk* within the limits of the village of *Ghatkopur*. One *Ruhimoo Kosum* of *Tanna* was the highest bidder, and, in pursuance of his contract,

he cut down the greater part of the timber; but when the attention of Government was called to the fact, they put a stop to the cutting down of the remainder, and prevented the removal of the trees which had been felled.

In consequence the Appellant, on the 15th of *November*, 1860, filed a plaint in the Court of the Judge of the District of *Konkun* against the Conservator of Forests and the Collector of the *Tanna* District, and stated his cause of action as follows:—
“All kinds of unassessed trees in the village of *Ghatkopur* are not allowed to be felled down; therefore, the claim for damages is laid in the amount of the value of the trees, Rs. 10,000.”

The Collector of *Tanna*, by his answer, insisted that, under the conditions of the *Cowl* granted to the Appellant, he had no right to the forests, because the forests were not specially granted in the lease; and that when the Appellant first made application for a lease of the village, he asked for waste land merely for the purpose of making salt batty crops, and for forming salt pans.

Evidence was entered into on both sides. The evidence of the Appellant's witnesses was to the effect, that other lessees as well as the Appellant had been in the habit of cutting and turning to their own profit the unassessed timber on the lands leased to them, without interference on the part of Government. But they failed to produce in evidence, and could not say that they remembered, any lease similar to that held by the Appellant in respect of its containing no specific grant of the forest trees. It was admitted that he had not felled any of the timber trees with the view or intention of bringing the land

1867.
RUTTONJI
EDULJI SHET
v.
THE
COLLECTOR
OF
TANNA.

1867.
 RUTTONJI
 EDULJI SHET
 v.
 THE
 COLLECTOR
 OF
 TANNA.

into cultivation. On the other hand, the witnesses of the Respondents produced in evidence several leases (under some of which the lessees mentioned by the Appellant's witnesses had held), all containing some clause specifically granting rights over the trees in the villages respectively conveyed to them.

The judgment of the District Judge (*H. P. St. G. Tucker, Esq.*) was delivered on the 5th of *June*, 1863. The material passages are the following:—
 “The first point for the Court to determine is the law which is to be applied to the matter in dispute, and it is of opinion that, there being no Act of Parliament, or Act, or Regulation, of the Indian or Local Legislatures, declaratory of the rights of persons in the position of Plaintiff, or which lays down any rules for the interpretation of contracts, the decision of the Court must be governed by the usage of the country, and in the absence of any specific usage (to employ the words of Reg. IV. of 1827, sec. 26) “by justice, equity, and good conscience alone.” In ordinary cases the personal law of the Defendant, where such law existed, would take precedence of equity and good conscience, but in this instance the real Defendants are the Government of *Bombay*, whose personal law must be held to be the Statute Law of the Presidency, which, as above remarked, is silent with regard to the question under adjudication. Usage, so far as it has been shown to exist, and general principles of equity, must, therefore, form the foundation of the Court's judgment. The doctrine of the English Law, namely, that nothing passed to a Crown lessee but what is specifically granted, has the Court's full concurrence, for it is a rule founded on obvious principles of public policy,

and its application to any particular nation or community cannot fail to be beneficial. In the present case the terms of the lease itself require a strict adherence to the rule, for in clause 6 it is declared, 'And only such portion of the rights of Government as may be herein specifically granted is hereby granted to you.' Was, then, any proprietary right over the forests specifically granted by the lease to Plaintiff? The Court cannot find in the lease anything which can be justly construed into the grant of such a right. Clause 2, on which Plaintiff relies, runs as follows:— 'The waste land of the village, including *Junglegurk*, *Naligurk*, and *Newsad*, &c., is hereby granted to you in *Mafee* (*i. e.* free from rent) for forty years from 1844-45. You are to make the necessary outlay and bring it under tillage, out of the sweet waste land, one fourth within the term of ten years from the date hereof; and you should in the same manner continue to do so every ten years, so as to bring the whole of it under tillage within that period; in failure whereof, the produce of the hay, amounting to Rs. 27, herein deducted, will be collected from you from the first to the last year of the exemption. You are to prepare the salt land for cultivation within five years from 1844-45; but if you fail to do so, a fine of Rs. 500 will be imposed upon you, and after the expiration of forty years, the full assessment, according to the prevailing usage of the country, will be collected annually from you on such land as may be under cultivation, as well as on such quantity as may remain waste out of the present waste entered in the public accounts.' Now, it seems clear that the lands conveyed by this clause were the culturable waste lands of the village, *i. e.* the lands entered under the

1867.
 RUTTONJI
 EDULJI SHET
 T.
 THE
 COLLECTOR
 OF
 TANNA.

1867.
RUTTONJI
EDULJI SHET
v.
THE
COLLECTOR
OF
TANNA.

head of '*Oshik*' in the accounts, and described in the lease itself as subject to an annual assessment of Rs. 27 while they continue uncultivated, which assessment was remitted to the Plaintiff for forty years, on condition that he brought a certain portion under tillage during each interval of ten years. The fact that no express mention was made of the forests which were in existence at the time the lease was granted, and that they were not included in the prohibition to cut taxable trees, will not justify the conclusion that it was intended to confer on Plaintiff a proprietary right over the timber growing on these forests. It is evident from clause 6, that it was not the intention of Government to grant any rights to the Plaintiff that were not specifically set forth in the lease, and as there is no mention of any seignorial rights over forests, mines, or quarries, such rights cannot be held to have passed to the Plaintiff. The evidence adduced by the Plaintiff has failed to establish that any lessees who hold on the same terms as himself possess the right of disposing of the timber growing in their villages at pleasure; the landlords whom his witnesses have deposed to have been in the habit of exercising such rights, with the exception of four, have been shown by the Defendants to have specific grants of rights over trees in their leases. With regard to the remainder, it was for the Plaintiff to prove that they held under leases similar to his own; and as he had not done this, it may not unfairly be inferred that there were special grants in the leases of these persons also. Allusion was made at the trial to the rights of the hereditary *Khotes* of the *Konkun*, whose estates were acquired under the *Marattah* Government, over the timber growing in

their villages, but the Court has deemed it unnecessary to enter on the question of the rights possessed by those persons. The tenure of the hereditary *Khotes* and the holding of the Plaintiff rest on different foundations. The Plaintiff's title originated in his lease, and is limited by that deed. The only usage which the Plaintiff has established is, that on two occasions he cut such wood as he wanted from the forests, and that, on the last occasion, he sent the wood he had cut to *Bombay*; and that a previous lessee, who held the village for five years on a written lease, the terms of which are not known, did the same. Usage of this description confers no prescriptive right. The Court, then, holds, that neither by the terms of his lease, nor by any recognized usage, has the Plaintiff acquired an absolute ownership in the timber such as he has claimed by his acts; but it is also of opinion, that, as Lessee for a long term, he possesses an equitable right to take from the forests at *Ghatkopur* such timber as he requires for the construction and restoration of his village residence and farm buildings, the formation and preservation of fences, and the making and repairing instruments of husbandry, as well as firewood for household purposes in the village. Such privileges are in most countries incident to farm leases, where not restrained by covenant; and it would seem from the evidence of the Defendants' witness, the *Mamlutdar* of *Salsette*, No. 38, that up to 1840-41 tenants of all descriptions were permitted to cut any wood they pleased in the forests adjacent to their lands. This licence was abused, and the Government, acting in the public interest, instituted a department for the conservation of forests; but the Court does not believe that it was ever intended to deprive either

1867.

RUTTONJI
EDULJI SHET
v.
THE
COLLECTOR
OF
TANNA.

1867.
RUTTONJI
EDULJI SHET
7.
THE
COLLECTOR
OF
TANNA.

the cultivators or superior landholders of the use of wood for legitimate farming purposes, which they had hitherto enjoyed. However this may be, it is shown by clause 25 of the lease, that at the time it was made, the Government admitted the right of the *Ryots* in *Ghatkopur* and other villages to take wood from the forests; and no special restriction having been placed on the Plaintiff, it may be presumed that it was not intended he should be placed in a worse position than his under tenants. The Court, therefore, holds, that, under the lease, he did possess the right to cut timber and firewood to the extent above stated, subject to the orders of Government with regard to the time and manner in which the timber should be felled and removed. On the second issue, the Court having declared the extent of the right which it considers to have been possessed by the Plaintiff under the lease, the remaining question to be determined is, whether he has suffered damage from any infringement of that right. It would appear that he has been the real trespasser, for he attempted to clear the forest, not for the purpose of extending the cultivation, but with a view solely to his private profit. The Government Officers were undoubtedly justified in stopping this illegal usurpation, and no damage can be claimed from them on account of any loss that the Plaintiff may have suffered through his own irregular proceedings. The Plaintiff has not established that the Defendants ever prevented his enjoyment of the limited right which the Court considers he possesses, and it is clear that the concession of this restricted privilege was never sought for by him, and was, therefore, never refused. The Court, under these circumstances, consider the claim for damage altogether

inadmissible, and it consequently decrees for the Defendants with all costs on the Plaintiff."

The Appellant appealed against this decree to the High Court of Judicature at *Bombay*. In his grounds of appeal it was urged, that the forest which the Appellant claimed the right to fell, grew on lands conveyed by the second clause of his lease; that as the fourth clause expressly prohibited the lessee from cutting *brab*, date, and other trees liable to taxation, it thereby implied that the lessee was entitled to cut all other trees; that the reservation in the sixth clause had no reference to the rights of property conveyed by the lease; that the District Judge should have treated the lease as if it had been granted by a private individual; and that it should not have been construed by the rules of law applicable to leases for years in *England*.

The appeal was heard by the High Court at *Bombay*, consisting of the acting Chief Justice *Arnould*, and the Justices *Newton* and *Funardhun Vasood-ewji*, on the 29th of *June* and 27th of *July*, 1864, when the Court gave judgment, affirming the decree of the District Court with costs.

The present appeal was from this judgment.

The case of the Appellant was, that, according to the true construction of the *Cowl*, the material portions of which are hereinbefore mentioned, the Appellant was only prohibited by that instrument from cutting down trees that were liable to taxation, and, therefore, had a right, according to the maxim "*expressio unius est exclusio alterius*," to cut down trees not liable to taxation, and, by a necessary implication, he also had a right to remove them; that he had the same

1867.
RUTTONJI
EDULJI SHET
v.
THE
COLLECTOR
OF
TANNA.

1867.
 RUTTONJI
 EDULJI SHET
 v.
 THE
 COLLECTOR
 OF
 TANNA.

rights by custom as were exercised by other *Khotes* in the same *Talooka*, of felling and appropriating to their own use the unassessed trees within their respective boundaries ; that the law of *England*, which had been referred to in the Court of First Instance, relating to the reciprocal or conflicting rights of Lessors and Lessees, or tenants in reversion or remainder, with respect to timber or trees, did not apply ; and that at the time of the granting the *Cowl* there was not in force within the Island of *Salsette* any law restraining Lessees for years from felling or disposing of trees not liable to taxation growing upon their holdings, unless by express agreement.

For the Respondent it was contended, first, that the *Cowl* to the Appellant did not confer on him the right to cut down and appropriate the forest timber in question, and that nothing short of a specific grant could convey such a right ; and, secondly, that the Appellant had failed to prove that there was any customary right on the part of a Lessee under a Government lease to cut down and appropriate to his own use such forest timber.

Rom. Regs., IV. of 1827, sec. 26 ; I. of 1808, sec. 4, cl. 1 ; and Acts, Nos. I. and IV. of 1865 were referred to in the course of the argument.

Mr. *Manisty*, Q.C., and Mr. *T. Chisholm Anstey*, for the Appellant, and

Mr. *Forsyth*, Q.C., and Mr. *Merivale*, for the Collector of *Tanna* and Conservator of Forests.

Without calling on the Respondents' Counsel, their Lordships delivered judgment by

The Right Hon. Lord CAIRNS :—

In this case a plaint was filed in the *Konhum* Dis-

trict Court by the Appellant, and the complaint which he made was founded on a lease which was granted to him by the Acting Collector of the District of *Tanna*, on the 31st of *December*, 1845, of the village of *Ghatkopur*. The complaint was that, contrary to the terms of that lease, the Defendants did not allow the Appellant to fell unassessed trees in the village, or to apply them to his own use,—that is, to carry off the trees from the ground on which they grew, and to dispose of them to the use of the Appellant; that claim being on the face of it founded upon the lease which had been granted to the Appellant.

1867.
 RUTTONJI
 EDULJI SHET
 v.
 THE
 COLLECTOR
 OF
 TANNA.

The evidence with regard to this timber is to be found in the testimony of *Ruhimoo Kosum*. That witness thus describes the timber :—" I know *Ruttonji Edulji*, the Plaintiff in this case. Three or four years ago I entered into a contract with him to cut all the teak, blackwood, and *kheir* trees, small and great, in the forests of *Ghatkopur*, for Rs. 4,900. It was agreed that I should cut the trees at my own cost. I accordingly cut a portion of the trees, but was prevented from doing so by the Government authorities, and the trees cut down were attached, and, therefore, I could not remove the trees. I paid *Ruttonji Edulji* Rs. 1,225 on account of the contract, but as the wood was not made over to me, *Ruttonji Edulji* paid me Rs. 1,950, including expenses, etc." In answer to the Defendants' questions, he says,—“ Some of the trees for which I had made a contract were timber trees, and some were fit for firewood, and had I carried out the contract I should have cut down all the teak, blackwood, and *kheir* trees, great and small. Some of the trees would only have been fit for fire-

1867.
 RUTTONJI
 EDULJI SHET
 v.
 THE
 COLLECTOR
 OF
 TANNA.

wood, other jungle trees fit for firewood would have remained in the forests of *Ghatkopur*. I took the said contract at a public sale, and there was a written agreement for the same. I have not brought it with me. The auction was held in the village of *Ghatkopur*." Afterwards, in answer to the Court's questions, he says,—“ If I had cut the trees according to the contract, wood to the value of Rs. 1,000 or Rs. 2,000 would have been left in the jungle. Before I was prevented by the authorities from removing the wood, I sold about Rs. 300 worth of wood to the neighbouring villagers, and the said sum was accounted for.”

Another witness of the Appellant, *Manockjee Rustomjee*, adds this: “ There are jungle *Gharaks* at *Ghatkopur*, which are on the tops of the hills and on the banks of ravines. If the jungle were not cleared, rice would not grow, but other grains might grow there; but it is not the custom here to raise other grains; but grass would grow on the said land. When the Plaintiff got the village, in A.D. 1845, Government had no right to the jungles in the *Talooka Salsette*, nor did Government interfere. I have no knowledge whatever regarding the other villages of Government. The Plaintiff did not fell the trees on the jungle *Gharak* with the intention of bringing the land into cultivation.”

The claim, therefore, is not to cut certain trees for the purpose of clearance or cultivation—not to cut certain trees for the purpose of repairs or consumption on the ground of which the Appellant is lessee—but to sell to a Timber Merchant the whole of the trees, large and small, upon the land, to be cut and carried away by him for his own purposes.

It will be convenient now to observe the position of the Appellant under the lease upon which he grounds his claim.

The petition for that lease is in these terms:—
 “That your Petitioner is desirous of farming the village of *Ghatkopur*, on the Island of *Salsette*, and prays that your Honourable Board will be pleased to lease it to him on the same terms as villages have been granted to different individuals in *Salsette*. In submitting this application to your Honourable Board’s favourable consideration, your Petitioner begs to state that he is aware there is in the village in question little or no waste land, whereby he could at present much benefit himself, but he is desirous of obtaining it to give effect to a speculation which he has had for a long time under consideration, viz. the recovering a large tract of swamp land, for the purpose of converting it into salt batty fields and salt pans. Your Petitioner wishes to lay out capital on the work contemplated, which, when finished, he feels assured, while it will benefit himself, will much improve the village, benefit the *Ryots*, and increase the revenue which Government derives from it.”

Founded on that application, the lease was made on the 31st of *December*, 1845. It begins by stating that the Lessee had “petitioned Government on the 23rd *May*, 1843, that if the village of *Ghatkopur Turf Trombay, Talooka Salsette*, be allowed to you in farm, in the same manner as villages have been granted to other Farmers in *Salsette*, that you would reclaim certain swampy land, and that you would form salt pans and salt batty fields, whereby the inhabitants on the one hand, and the Government on the other, will be much benefited. Your application

1867.
 RUTTONJI
 EDULJI SHET
 v.
 THE
 COLLECTOR
 OF
 TANNA.

1867.
 RUTTONJI
 EDULJI SHET
 v.
 THE
 COLLECTOR
 OF
 TANNA.

having been duly reported upon by the Acting Collector, under date the 10th *August*, 1843, Government, in its Secretary's letter, dated 4th *September* following, No. 2903, intimated its sanction to the aforesaid village being granted to you in farm; accordingly it is hereby leased to you from the year 1844-45, for a period of ninety-nine years, on the revenues of the year 1842-43 (exclusive of the *Abkary*), on the following conditions." The objects, therefore, for which the lease was solicited, and the objects for which the lease was granted, were the reclaiming certain swampy land, and forming salt pans and salt batty fields, together with such incidental advantages as might be obtained from the use of the waste land as it then stood in the village.

It may be convenient to advert here to an argument which was much pressed upon their Lordships, namely, that inasmuch as the application had been for a lease to be made in the same manner as villages had been granted to different individuals in *Salsette*, therefore, as it was contended, this lease was upon whatever terms it might be found that leases had been made to other Farmers in that District.

Their Lordships are of opinion that, although the application was general, the response was specific and clear. The answer to the application was, that a lease would be granted on "the following conditions," which are described in the lease itself, and which, therefore, determine the contract, and the only contract, between the parties.

Proceeding with the lease. The first clause describes, as it states, the details of the boundaries, houses, inhabitants, lands, and the *Jummabundy* of the village.

It is important to observe that, among the details

of lands under this head, it is admitted there are no lands upon which the trees in question are growing. The lands described under the first head are the arable or cultivated lands of the village, and certain limited waste land described by admeasurement. It is admitted that they had not growing upon them any of the trees which are now in question. The second section of the lease provides that "the waste land in the village, including *Junglegurk*, *Naligurk*, and *Nowsad*, &c., is hereby granted to you in *Mafee* (that is to say rent free) for four years from 1844-45. It then provides that this waste land was to be brought under tillage, "out of the sweet waste land, one-fourth within the term of ten years from the date hereof; and you should in the same manner continue to do so every ten years from the date hereof; and you should in the same manner continue to do so every ten years, so as to bring the whole of it under tillage within that period," that is, so that at the expiration of forty years the whole might be under tillage and bring revenue to the Government accordingly.

It is to be observed here again, that it is admitted that the land upon which the timber now in question grows was not included under the second head. The contest, indeed, of the Appellant is, that for the land upon which that timber is growing he is under no circumstances to be called upon to pay rent.

The 32nd clause of the lease states,—“There are in the aforesaid village about 150 *Beegas* of swampy land, which might be made available for salt pans; you are, therefore, as proposed by you in your petition, to expend whatever sum of money may be considered necessary, and convert the said land into salt

1867.

RUTTONJI
EDULJI SHET
v.
THE
COLLECTOR
OF
TANNA.

1867.

RUTTONJI
EDULJI SHET
v.
THE
COLLECTOR
OF
TANNA.

pans, within five years from 1844-45," under a certain penalty in the event of failure so to do.

It is admitted, again, that with regard to the lands specified under the 32nd head, none of the timber is growing upon that land. We have, then, under the 2nd and the 32nd heads of the lease an enumeration of the whole of the land upon which any operation of farming or reclaiming was to be performed by the lessee. It is for the land specified under those heads, and for that land alone, that any rent or any assessment is to be paid by the lessee; and for the land upon which the timber in question is now growing no rent had already been paid, or is in any event to be paid.

Then there are a series of provisions, especially contained in paragraphs 6, 7, 9, 10, 11, 12, 25, 26, 27, 28, and 29, which provide for the preservation and protection of the possessory and other rights of the *Ryots* and other persons having pre-existing claims upon land in the village. Among them is an important section, referred to in the argument, the 6th, that provides as follows, "It is clearly to be understood that this lease confers no right which Government does not now possess, and only such portion of the rights of Government as may be herein specifically granted, is hereby granted to you."

We are in a position, from this statement of the paragraphs of the lease, to understand distinctly the objects for which the lease was granted. The first object was to enable the Lessee to cultivate the arable land. The second object was to enable him, and to oblige him, to reclaim and bring under tillage certain specified waste lands—land other than that upon which this timber is growing. The third object was

to convert into salt pans 150 *Beegas* of land, being, again, land other than that upon which the timber in question is growing.

Over and above these three objects, he was to be styled the "Farmer" of the village; not that he was to have possession of other parts of the village, or to dispossess those already in occupation—not that he was to be the cultivator or Farmer of other parts in the English sense of the term "Farmer"—but, as the 12th section expressly provides, "In respect to the above-named village, you are considered Farmer thereof; you are, therefore, to exercise the authority vested in Farmers by chap. 6 of Regulation XVII. of 1827, or such as may be hereafter vested in them by any new enactment."

Upon referring to this Regulation, it is apparent that the term "Farmer" is used, not as a cultivator of the ground, but as a Farmer of the public revenue,—a person, namely, who would stand between the Government and the *Ryots* as possessors of the ground in the village; he being, as it were, the custodian or Ranger, taking care that the revenue of the Government was collected, and the rights of the Government as against the possessors in the village maintained.

At the time, then, that this lease was made, the whole of the land, and all the rights connected with the land, subject to such claims as third parties might have upon it, belonged to the Government. The trees upon the land were part of the land, and the right to cut down and sell those trees was incident to the proprietorship of the land.

The Appellant, therefore, who complains of an interruption such as is described in his plaint, must

1867.

 RUTTONJI
 EDULJI SHET
 v.
 THE
 COLLECTOR
 OF
 TANNA.

1867.
RUTTONJI
EDULJI SHET
7.
THE
COLLECTOR
OF
TANNA.

ground his title to these trees, and the right to cut them down, either upon this, first, that it is a necessary incident of the lease by reason of the objects of the lease ; or, secondly, under some positive law ; or, thirdly, under some custom to be incorporated in the lease ; or, fourthly, under the express terms of the lease.

Now, as regards the right to cut timber being necessarily incident to the lease, it plainly is not so. There was no work to be done, and apparently no right to execute any work, upon the land on which this timber grows. Clearance or cultivation of the other land might require the cutting of timber on that other land, but that right does not come into question in the present suit.

As to positive law, none has been cited to justify what has been done by the present Appellant. We were referred to *Bombay* Regulation I. of 1808 with regard to the Island of *Salsette* ; but, so far as that Regulation is concerned, the whole drift and tenor of it, when it deals with timber at all, is in favour of the preservation of the right, and not of the surrender of the right, in the Government to the timber.

The Appellant, however, relies upon a custom which he says justified the cutting of timber ; and evidence of that custom has been adduced.

Their Lordships would entertain very considerable doubt whether any evidence of custom could be allowed to control the express stipulations which they find in the lease of this village ; but, turning to the evidence which has been given in support of the alleged custom, their Lordships find that several of the witnesses, speaking to that custom, admit that the villages upon which they say timber has been cut

down by the Lessees, were villages leased under written contracts,—contracts which dealt, in some way or other, with the subject of the timber; contracts, therefore, which prevented any general custom flowing out of the rights exercised by those tenants. Their Lordships find that other of the witnesses, when speaking of the timber cut on other villages, expressly state that that timber has been cut, not as of right, but by permission of the Government. And their Lordships find generally with respect to all the witnesses, or all but one, that they are silent as to any information leading them to judge whether the timber which they say was cut, was cut for the purpose of repairs or other consumption in the villages, or was cut for the purpose of clearance or cultivation, or cut (as the right to cut is here alleged) for the purpose of sale or other disposition as property of the tenant.

Their Lordships, therefore, are of opinion that the allegation of custom entirely fails to be supported by evidence.

With regard, lastly, to any express right given by the lease itself, their Lordships can find none; on the contrary, the 6th clause, which has been already referred to, expressly declares that only such portion of the rights of the Government as may be therein specifically granted is thereby granted to the Lessee.

The 4th clause, however, was said by implication to confer the right to cut that timber. The words of that clause are these:—"You are prohibited from cutting down or destroying any *brab*, date, or other trees liable to taxation, without the permission of the Collector."

1867.
RUTTONJI
EDULJI SHET
v.
THE
COLLECTOR
OF
TANNA.

1867.

RUTTONJI
EDULJI SHET
v.
THE
COLLECTOR
OF
TANNA.

Their Lordships, however, do not consider that this clause is susceptible of the implication which is derived from it by the Appellant.

In the course of clearing and cultivating the waste land which the Appellant was obliged to clear and to cultivate, it naturally would be requisite to cut down and remove the timber growing upon that waste land, and their Lordships read that permission as simply declaring that if, with reference to that timber which it would thus be necessary to cut down and remove, any of it was "*brab*, date, or other trees liable to taxation"—even as to such timber, none should be removed without the express permission of the Collector.

Their Lordships, therefore, are of opinion that the case of the Appellant entirely fails; they concur with the judgments pronounced by the Judge of the District Court, and by the appellate Court at *Bombay*; and they will humbly advise Her Majesty that the appeal should be dismissed with costs.

TAREENY CHURN BONNERJEE ... *Appellant,*

AND

WILLIAM MAITLAND and FREDERICK }
ADDINGTON GOODENOUGH ... } *Respondents.**

On appeal from the High Court of Judicature at Calcutta.

THE appeal in this case was brought from a decree of the High Court in *Calcutta*, varying and amending a previous decree made by two of the Judges of that Court, in its ordinary original civil jurisdiction, in a suit instituted by *Richard Stuart Palmer*, since deceased, and afterwards represented by the Respondents, his Executors, against the Appellant, together with *Obhoychurn Bonnerjee*, an Insolvent debtor, *Ramessur Chowdry*, a Trustee, and *John Cochrane*,

11th & 12th
July, 1867.

A. by Deed of trust charged real estate to secure, among other things, a debt alleged to be due by him to his grandfather's estate, on account of sums received by him from a debtor to that estate. A. at that time was in a state of indebtedness, which occa-

* Present :—Members of the *Judicial Committee*—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

sioned his afterwards becoming an Insolvent. Such Deed, in the circumstances, held, so far as related to A.'s alleged debt, fraudulent and void as against his Creditors.

On a Bill filed by the Assignees of the Insolvent to cancel such a Deed, the property being immovable, and the parties (Defendants) claiming a lien thereon for *bonâ fide* debts, the remedy, if any equity exists, independent of the deed, would be by a cross Bill.

The rule of the appellate Court is, that it will not, on a question of fact, reverse an unanimous judgment of the Courts in *India*, unless the very clearest proof is shown that such decision is erroneous.

1867.
 TAREENY
 CHURN
 BONNERJEE
 v.
 MAITLAND.

Official Assignee of the estate and effects of the Insolvent. The Bill prayed that it might be declared that a Deed of assignment in trust, dated the 25th of *April*, 1843, executed by *Obhoychurn*, a Trader in embarrassed circumstances, in favour of his Mother, *Hurrosoondery Dabee*, was fraudulent and void, and that the same might be set aside, as against the Plaintiff, and cancelled; that the Plaintiff might be declared entitled to an absolute estate in possession of one undivided moiety of certain real estate, which had belonged to *Obhoychurn*, the subject of the assignment, and the rents and profits; that the Defendants might be directed to let the Plaintiff into possession of the same without any disturbance from the above-named Appellant, who was entitled to the other moiety; and that, if necessary, the relief to be granted might be decreed to be supplemental to the relief granted in a former suit brought in the same Court, in which *John Storm* and others, Creditors of *Obhoychurn*, through whom the Plaintiff, as a purchaser, claimed title, were Plaintiffs.

The question raised in the suit was, whether the Appellant, as one of the residuary legatees in remainder under the Will of one *Doorgachurn Chuckerbutty*, deceased, was entitled to claim any benefit under the above Deed of assignment in trust, and which, by a final decree (made in the former suit above mentioned), had been declared and decreed to be fraudulent and void as against the Creditors of *Obhoychurn* and the Plaintiffs in that suit, but which last-mentioned decree had reserved to *Ramessur Chowdry*, and *Nemychurn Bonnerjee* (since deceased), as Trustees under the Deed, and to all persons other than the Defendants in that

suit, namely, *Obhoychurn* and his Mother, *Hurro-soondery*, any rights and interests which they might have under the Deed.

1867.
TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

The first of the two decrees made in the suit in which the present appeal arose declared that the Deed was not a good and valid security to *Tareeny Churn Bonnerjee* and the Executors of *Doorgachurn Chuckerbutty*, for Rs. 43,674 and interest, that sum being part of an alleged balance of account, namely, of Rs. 87,500, which formed the consideration of the Deed, dated the 25th of *April*, 1843; but that the latter should stand and be a good and valid security as far as the above Appellant was interested thereunder for the remaining part of the consideration therein mentioned. This decree at the same time declared, that the Deed was, on the ground of fraud, invalid against Creditors, not having been made *bonâ fide*, and executed for a good consideration, by *Obhoychurn*. Both parties appealed against that decree. The second of the two decrees was made by the High Court in its appellate jurisdiction, and it varied the decree of the lower Court, by decreeing, not only that the deed was fraudulent and void against *Obhoychurn's* Creditors, and in particular against the Plaintiff and those persons through whom he claimed title to the one undivided moiety of the real estate aforesaid, but also that the Appellant was not entitled to any interest or benefit under the Deed—first, because the latter was declared and decreed to be fraudulent and void; and, secondly, because, even if the Deed had been *bonâ fide*, there was no express trust therein declared in the Appellant's favour, and further, that he had failed to prove that he was interested in any part of the alleged

1867.
 TAREENY
 CHURN
 BONNERJEE
 v.
 MAITLAND.

consideration mentioned in the Deed, or in the amount thereby secured.

The facts of the case were as follows:—

In July, 1825, one *Doorgachurn Chuckerbutty*, of *Calcutta*, died, possessed of considerable property, having made a Will, whereby he devised and bequeathed, as to his residuary estate, as follows:—"I give, devise, and bequeath the same to my only daughter, *Sreemutty Hurrosoondery Dabee*, to and for the term of her natural life, and after the decease of my said only daughter I will and direct," (certain payments to be made to the daughters of such daughter) and then, "I give, devise, and bequeath all the residue of my said real and personal estate and property so hereinbefore bequeathed to my said daughter for life, unto all and every the sons of my said daughter; if there shall be more than one son, equally to be divided between the said sons share and share alike, as tenants in common," and he appointed *Goureychurn Bonnerjee*, *Bissonauth Muttyloll*, and *Obhoychurn Bonnerjee* his Executors, the two first of whom alone proved the Will.

Doorgachurn Chuckerbutty, in his lifetime, had had money transactions with Mr. *Marjoribanks*, the Resident at *Santipore*, and at the time of his death was a Creditor of *Marjoribanks* for Rs. 20,000 and interest, due on a Bond.

The case of the Appellant was, that in the year 1822, *Obhoychurn Bonnerjee* was appointed *Dewan* to *Marjoribanks*, and in 1823 he acted as private Agent for *Marjoribanks*. After the death of *Doorgachurn Chuckerbutty*, his Executors being informed that *Obhoychurn Bonnerjee* was in the receipt of private funds belonging to *Marjoribanks*, expected

that he would, out of those funds, repay the amount due by him to *Doorgachurn Chuckerbutty's* estate, and although he appeared to have received large sums on account of *Marjoribanks*, he never paid it over either to *Marjoribanks* or the Executors; and it was stated by the Appellant that, in *March*, 1830, *Marjoribanks* wrote the following letter to *Obhoychurn Bonnerjee*: "You may as well bring up your private account with me and compare it with mine. It must be rather large against you; however, we shall have no difficulty in coming to a settlement." It was alleged that this settlement was effected by the amount due by *Obhoychurn Bonnerjee* to *Marjoribanks*, and which, according to the account as stated in his Books, amounted to Rs. 43,674, being transferred to the credit of the latter's account with the Executors of *Doorgachurn Chuckerbutty*, they debiting *Obhoychurn Bonnerjee* with that amount, and accordingly, on the 21st of *August*, 1830, *Marjoribanks* sent to the Executors the following draft on *Obhoychurn Bonnerjee*:—"Please to pay to *Goureechurn Bonnerjee* and *Bissonauth Muttyloll*, Executors to the estate of *Doorgachurn Chuckerbutty*, the sum of sicca rupees forty-three thousand six hundred and seventy-four, being the amount balance of account between us.

43,674,
Santipore.

E. Marjoribanks,
21 *August*, 1830."

This draft was enclosed in a letter signed by *Marjoribanks* to the Executors, and at the same time the following letter was also written by him to *Obhoychurn Bonnerjee*:—"Obhoychurn,—On paying *Goureechurn Bonnerjee* and *Bissonauth Muttyloll*, Executors to the estate of your grandfather, the draft I

1867.
TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

1867.
 TAREENY
 CHURN
 BONNERJEE
 7.
 MAITLAND.

have given them for S. Rs. 43,674, all accounts between us are settled.

"Your friend,

"*E. Marjoribanks.*"

The draft was endorsed in blank by Executors and handed over to *Obhoychurn Bonnerjee*, together with the Bond of *Marjoribanks*; but instead of the money being actually paid by *Obhoychurn Bonnerjee* to the Executors, it was debited against him in their accounts, and he in his own account Books debited himself with the amount as due to the Executors, having given credit, as before mentioned, to *Marjoribanks*.

Soon afterwards *Obhoychurn Bonnerjee* began to engage in trade, and had large transactions with many houses, and from that time the sum of Rs. 43,674 was debited against *Obhoychurn Bonnerjee* in account with the Executors, and he obtained other advances from the estate. It was further alleged, that the account was prepared by *Obhoychurn Bonnerjee* in consequence of his Mother having called upon him for one, and that at her request he gave her a promissory note for Rs. 87,500, being the balance of account, making it payable twelve months after date. That during the year 1842 some of *Obhoychurn Bonnerjee's* shipments resulted in a loss, and gradually from that time he got into further difficulties; and when his promissory note to his Mother fell due she and her Attorney, Mr. *Graham*, threatened him with proceedings unless he entered into some arrangement, and that in consequence the Deed of assignment of the 25th of April, 1843, was prepared by Mr. *Graham*. It was between *Obhoychurn Bonnerjee* of the first part,

Hurrosoondery Dabee of the second part, *Nemychurn Bonnerjee* and *Ramessur Chowdry* as Trustees of the third part. It recited that *Obhoychurn, Bonnerjee* was entitled, in the event of his surviving his Mother, to one clear moiety of the residuary estate of *Doorgachurn Chuckerbutty*; that he was indebted to *Hurrosoondery Dabee* in Rs. 87,500, for advances made out of that residuary estate, which she was liable to make good; that he had been applied to for payment; that he was unable to pay, but had agreed to execute the Deed as security; and it was thereby witnessed that he sold and conveyed to the parties of the third part "All that the undivided moiety, or share, right, title, and interest, whatever the same may be, of him, the said *Obhoychurn Bonnerjee*, of and in the several messuages, lands, tenements, and hereditaments following, being respectively formed of the said residuary estate of the said *Doorgachurn Chuckerbutty*, deceased, that is to say:" And then followed the description of the property "to have and to hold the same respectively (subject to and after the determination of the life interest of the said *Sreemutty Hurrosoondery Dabee* therein respectively) unto and to the use of them (the parties of the third part) and the survivor of them, his heirs, and assigns for ever," upon the trusts thereafter declared. A similar clause, assigning his moiety of the personalty, then followed, and the trusts declared were as follows, viz.:—Out of the moiety of the personalty, or, if the same should be insufficient, out of the rents and profits of the moiety of the realty, or, if necessary, by sale thereof, to pay to the residuary estate the sum of Rs. 87,500, and interest at six per cent. and costs, and after full payment to

1867.
 TAKEENY
 CHURN
 BONNERJEE
 v.
 MAITLAND.

1867.
 TAREENY
 CHURN
 BONNERJEE
 v.
 MAITLAND.

make over what remained of such moiety to *Obhoychurn Bonnerjee* to his own use. The Deed contained the usual covenants for title and further assurance, power to appoint new Trustees, and a power of Attorney from *Obhoychurn Bonnerjee* to the Trustees.

Amongst other firms with whom *Obhoychurn Bonnerjee* had transactions was the firm of *Mackillop, Stewart, & Co.*, which transactions went on from the year 1836. On the 23rd of *August*, 1845, that firm brought an action against *Obhoychurn Bonnerjee* to recover Rs. 50,816 and interest; and he having failed to appear to the action, a Writ of sequestration was issued, under which the Sheriff of *Calcutta* seized the right, title, and interest of *Obhoychurn Bonnerjee* in certain portions of the property left by *Doorgachurn Chuckerbutty*, being six parcels out of the twelve parcels mentioned in the Deed, and the firm of *Mackillop, Stewart, & Co.* contended that *Obhoychurn Bonnerjee* had, in fact, obtained a moiety of *Hurrosoondery Dabee's* life interest in the property so seized.

Upon this *Hurrosoondery Dabee* brought an action of trespass against the Sheriff, and while it was pending *Obhoychurn Bonnerjee*, on the 4th of *February*, 1846, was declared an Insolvent, and Mr. *O'Dowda* was appointed his Assignee by the Insolvent Court of *Calcutta*; and on the 19th of *February*, 1846, *Obhoychurn Bonnerjee* filed his schedule in that Insolvent Court, in which he admitted the debt of Rs. 87,500 as due upon the aforesaid note in favour of *Hurrosoondery Dabee*. At the time of the insolvency he deposited his Books In the Insolvent Court.

On the 6th of *March*, 1846, judgment having been obtained on the 16th of *February*, 1846, was signed in the action by *Mackillop, Stewart, & Co.*, against *Obhoychurn Bonnerjee* for Rs. 64,865. 9. 3.

1867.
TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

On the 24th of *February*, 1846, the firm of *Mackillop, Stewart, & Co.* filed a Bill on the equity side of the Supreme Court at *Calcutta* against *Hurrosoondery Dabee, Obhoychurn Bonnerjee*, and his Assignee, alleging that *Hurrosoondery Dabee* had sold to *Obhoychurn Bonnerjee* one moiety of her life estate in *Doorgachurn Chuckerbutty's* property, and that *Obhoychurn Bonnerjee*, to defeat the rights of their firm under the sequestration, had, on the pretence of being indebted to her and *Nemychurn Bonnerjee* and *Ramessur Chowdry*, under a Bond, executed the before-mentioned Deed, reconveying that property to her; and it prayed for a declaration that *Obhoychurn Bonnerjee* had a seizable interest in the estate, and to have the reconveyance declared fraudulent, and to have it cancelled and *Hurrosoondery Dabee* restrained from proceeding in her action of trespass.

Obhoychurn Bonnerjee and *Hurrosoondery Dabee* by their answers relied on the Deed of the 25th *April*, 1843, and submitted that it was valid and *bonâ fide*, and they denied the allegation of *Hurrosoondery Dabee* having ever assigned the moiety of her life interest as alleged.

The Court directed issues to be tried, as to whether *Obhoychurn Bonnerjee* had at the time of the seizure under the sequestration any seizable interest in the property attached, which, on the 18th of *May*, 1848, were found in the affirmative.

On the 13th of *July*, 1848, a decree was made in the suit, declaring that the Deed was, so far as the

1867.
 TAREENY
 CHURN
 BONNERJEE
 v.
 MAITLAND.

interests of the Defendants, *Hurrosoondery Dabee*, *Obhoychurn Bonnerjee*, and *O'Dowda* were concerned, fraudulent and void as against the firm of *Mackillop, Stewart, & Co.*, and that *Obhoychurn Bonnerjee's* interest was seizable and saleable under the sequestration, but it reserved the rights under the Deed of *Nemychurn Bonnerjee* and *Ramessur Chowdry* (who were not made parties to that suit) and all persons other than the three Defendants.

Hurrosoondery Dabee applied for a rehearing of the suit, but the decree was affirmed.

After the decree the Sheriff of *Calcutta*, under the Writ of sequestration, sold the right, title, and interest of *Obhoychurn Bonnerjee*, in the property so seized, to one *Mackenzie*, to whom the Sheriff executed conveyances.

On the 23rd of June, 1861, *Hurrosoondery Dabee* died, leaving *Obhoychurn Bonnerjee* and the Appellant her surviving.

On the 14th of September, 1861, *Richard Stuart Palmer* filed a Bill in the Supreme Court against *Obhoychurn Bonnerjee* and the Appellant, and *John Cochrane* as *Obhoychurn Bonnerjee's* Assignee. The Bill stated the proceedings in the suit above detailed, and further that on the 8th of July, 1858, *Mackenzie* sold and conveyed his interest to the Plaintiff, and claimed for him an absolute title to *Obhoychurn Bonnerjee's* moiety of the estate, and charged collusion between the Defendants to keep him out of possession, contending that the Deed of assignment, dated the 25th of April, 1843, was fraudulent and void; and the Bill prayed, first, that it might be declared that under the circumstances therein stated, the Deed was fraudulent and void as against the Plaintiff, and

that the same might be set aside as against the Plaintiff and cancelled ; secondly, that the Defendant, *Ramessur Chowdry*, might be restrained by the Order of the Court from setting up or insisting upon the Deed, or using the same as against the seizure under the Writ of sequestration; or against the title conveyed by the Bills of sale ; thirdly, that it might be declared that, on the death of *Hurrosoondery Dabee*, the Plaintiff became and was entitled to an absolute estate in possession of one undivided moiety of the real estate, and of the rents and profits thereof ; and that the Defendants might be directed by the Court to let the Plaintiff into possession of one undivided moiety of the rents and profits, and without any disturbance from *Tareeny Churn Bonnerjee*, as the person entitled to the other moiety thereof, or from any of the Defendants ; fourthly, that the Defendants, *Ramessur Chowdry* and *Obhoychurn Bonnerjee* and *Tareeny Churn Bonnerjee*, and also *Cochrane*, as Assignee of *Obhoychurn Bonnerjee*, might be restrained by the Order and Injunction of the Court from selling, further meddling, or in any way dealing with the undivided moiety of the real estate, or with so much thereof as the Plaintiff was interested therein, and the rents and profits thereof ; fifth, that an account might, if necessary, be taken of the rents and profits and other moneys, the product of the real estate, or of such portion thereof as the Plaintiff was interested therein, received by the Defendants, *Ramessur Chowdry*, *Obhoychurn Bonnerjee*, and *Tareeny Churn Bonnerjee*, or any or either of them, since the death of *Hurrosoondery Dabee* ; and that the same, or a

1867.
TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

1867.

TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

moiety thereof, might be paid to the Plaintiff; and that, if necessary, the relief to be granted in that suit might be deemed to be supplemental to the relief granted in the former suit, wherein *Storm* and others were Plaintiffs, so far as related to *Obhoychurn Bonnerjee*, and also *Ramessur Chowdry's* claim to represent the interest of *Obhoychurn Bonnerjee* as Trustee for him in respect of one moiety of the undivided moiety; and so far as related to *Tareeny Churn Bonnerjee* as Executor; and so far as he might set up any claim as heir or representative of, or as deriving his title through, *Hurrosoondery Dabee*; and that to such extent the Defendants respectively might be held to be bound by the proceedings in that suit.

Before the hearing *Palmer*, the Plaintiff, died, leaving the Respondents his Executors, who revived the suit.

The cause came on for hearing on the 6th of *February*, 1863, before Sir *Charles Jackson* and *Walter Morgan*, Esquire, two of the Judges of the High Court of Judicature, which had been substituted for the Supreme Court, and the hearing lasted several days. The Plaintiffs read as evidence, as against the Appellant, certain portions of his answer filed in the cause, being admissions as to the death of *Doorgachurn Chuckerbutty*, leaving him surviving the persons therein stated, and leaving property and a Will (but disputing the accuracy of the statement in the Bill as to the residuary clause), and admissions of the fact of some portions of the proceedings having taken place in the actions and suit as before mentioned and set out in the Bill, and of *Obhoychurn Bonnerjee's* insol-

1867.

TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

vency, and of the Defendants being subject to the jurisdiction of the Court. The Plaintiffs also examined as witnesses, *Obhoychurn Bonnerjee*, *Raphael Z. Shircore*, *Henry George Temple*, and *Nobinchunder Mookerjee*. The head assistant of the Official Assignees' office was called to produce from the Insolvent Court the account Books of *Obhoychurn Bonnerjee's* estate, but he produced only twelve Books, which he had found after strict search in the office; and he deposed to the fact of many Books in the Insolvent Office being destroyed. The Books produced were day-books (*Rokurs*) for the Bengalee years 1238, 1243, 1245, 1246, 1247, 1248, six in number; and ledgers (*Khuttians*) for 1237, 1238, 1239, 1241, 1247, and 1248, also six in number, there being both day-books and ledgers for three of these years, viz., 1238, 1247, 1248. A witness proved the execution of the conveyances from *MacKenzie* to *Palmer*. Another witness, *Nobinchunder Mookerjee*, proved the state of indebtedness of *Obhoychurn Bonnerjee*, and the debt to Messrs. *Mackillop, Stewart, & Co.*, which, it appeared, arose out of trade transactions between 1836 and 1845. *Obhoychurn Bonnerjee* was also examined as a witness for the Plaintiff, and stated the circumstances as to the origin of the debt forming the consideration for the deed.

On the 12th of *February*, 1863, the Court delivered judgment, and on the same day a decree was made declaring the Deed to be valid as a security to the Appellant only to the extent of the consideration money, exceeding Rs. 43,674 and interest, and not to be valid as a security to *Obhoychurn Bonnerjee*.

The Appellant appealed against this decree to the

1867.

TAREENY
CHURN
BONNERJEE
v.
MAITLAND,

appellate branch of the High Court, upon the following grounds:—First, that although the Court had rightly held that the *onus* of proof lay on the Plaintiffs, the Court called on the Defendants to go into a case after the Plaintiffs had failed to make out a *prima facie* case, and that the circumstance that the evidence of the witness called by the Plaintiffs disclosed a somewhat suspicious case was wholly insufficient to establish an affirmative case of fraud. Second, that if the evidence of *Obhoychurn Bonnerjee*, the principal witness called by the Plaintiffs, was to be believed, it established the Deed of trust, and if it was not to be believed, there was no evidence affecting the Deed one way or the other. Third, that the Court treated the case as if the real question was, whether consideration for the Deed was proved, whereas the real question was whether the Deed was proved to be fraudulent as against the Creditors of *Obhoychurn Bonnerjee*; and all that was proved was that he, being a Trader in indebted circumstances, executed a Deed not purporting or shown to be voluntary, and not purporting or shown to be an assignment of all his property, and which, moreover, was an assignment by way of security only. Fourth, that upon the only facts stated, and the only case made by the Bill, raising the issue that the Deed was fraudulent *in toto*, the Court ought to have dismissed the Bill, instead of giving a decree partially in favour of the Plaintiffs. Fifth, that supposing the Defendant, *Obhoychurn Bonnerjee*, had not been bound by the former decree, no decree could possibly have been made against him, on the evidence given in the present case for the Plaintiffs, and that the Defendant, *Tareeny Churn Bonnerjee*, as the Court found, was not bound by the decree, and had

no notice of any fraud, could not be in a worse position than *Obhoychurn* would have been in on the above supposition ; and, lastly, that nothing transpired during the case for the Plaintiffs, to raise any presumption or probability that there was any evidence bearing on the case one way or the other which the Defendants could have adduced.

The appeal was heard on the 3rd of *July*, 1863, before Sir *Barnes Peacock*, Sir *Mordaunt Lawson Wells*, and *E. P. Lavinge*, Esq., the Judges of the High Court.

At the hearing of the appeal the Appellant, by leave of the Court, took the objection to the whole frame of the suit, that inasmuch as the original Plaintiff was simply a purchaser from a purchaser at the Sheriff's sale of *Obhoychurn Bonnerjee's* right, title, and interest, and not a Creditor of *Obhoychurn Bonnerjee*, he had no right in law to seek to set aside the assignment as one fraudulent against Creditors, he being an Assignee only of the party who executed the alleged fraudulent assignment. The Respondents also took an objection that the decree did not go far enough, and that it was erroneous in declaring the Deed to be a valid security to the Appellant at all.

The High Court varied the decree of the Court below, by declaring the Deed to be fraudulent and void as against the Plaintiffs, and those through whom they claimed in the suit, and ordered the Deed to be cancelled, and declared that the Plaintiffs, on the death of *Hurrosoondery Dabee*, were entitled to an absolute estate, in possession of one undivided moiety of the real estate mentioned in the Bill, and of the rents and profits, and further ordered that they should

1867.
TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

1867.

TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

be put in possession, giving the usual consequential orders by way of injunction, and for payment of back rents and profits to the Plaintiffs, and ordered the Appellant to pay the costs of the appeal.

The appeal was from this decree.

The Attorney-General (Sir *John Rolt*, Q.C.) and Mr. *J. Bell*, for the Appellant.

First, the Court below, by holding that the Deed of the 25th of *April*, 1843, was fraudulent and void as against the Plaintiffs, instead of passing a decree for the benefit of the Creditors of *Obhoychurn Bonnerjee* (as one of whom the Appellant claimed), made a decree that was prejudicial to their claims, including that of the execution Creditor, if unsatisfied. Inasmuch, therefore, as the purchaser at the Sheriff's sale bought the right, title, and interest of *Obhoychurn Bonnerjee*, the money arising from such sale went to the execution Creditor, the Deed being subsequently declared void as against Creditors generally, and not only as against the firm of *Mackillop, Stewart, & Co.*, the value of the property would materially increase the estate, and, having passed to the purchaser at the Sheriff's sale, it could never thenceforth be applied to the unsatisfied portion of the execution Creditors' claim, or to the claim of other Creditors, unless the purchaser at the Sheriff's sale was, as purchaser of the right, title, and interest of the execution Creditor, held to be entitled to the estate only after payment of all claims of Creditors against it. The Court below was also in error in assuming that the Deed had been in the former suit declared void so far as *Obhoychurn Bonnerjee* was concerned, for the finding was that it was only void so far as

affected the firm of *Mackillop, Stewart, & Co.*, and there was no evidence to show that the claim of that firm was not satisfied by the money received by them from the Sheriff on the sale of the property seized and sold by him under the Writ of sequestration. Another objection is, that the Deed comprised other property besides that contained in the conveyances to the Plaintiff in the original suit, and the Plaintiff not having or claiming to have any interest in such other properties, or any rights as Creditor of *Obhoychurn Bonnerjee*, the Deed ought not to have been ordered to be cancelled so as to deprive the parties interested under it of their right to the Rs. 13,873, due by *Obhoychurn* to the estate of his grandfather. Such debt is not in dispute, and must stand as a security for that amount.

Secondly, the High Court, in affirming the decree of the Lower Court upon the question of fact, that neither the evidence given by *Obhoychurn Bonnerjee* nor the Books produced at the hearing were to be believed, was wrong, because, as to the Books, the same were produced from the office of the Insolvent Court, where they had been for upwards of sixteen years previous to the hearing of the suit, and there was nothing whatever in the appearance of the Books or in evidence in the case to entitle the Court to impute to that witness fabrication of the Books, nor was there anything to entitle the Court below to impute to that witness the perjury that has been imputed to him. The circumstances of the case were not such as to justify the Court in holding itself bound by the conclusions of fact arrived at by the Court below from the evidence given in the cause, but the Court ought itself to have examined the

1867.
TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

1867.
 TAREENY
 CHURN
 BONNERJEE
 v.
 MAITLAND.

evidence and formed its own conclusions thereon. Nothing turned on the demeanour of witnesses, but the opinions of the Court below on the evidence was founded upon reasoning thereon which was unsound and clearly open to review. Even if *Obhoy-churn Bonnerjee's* evidence was such as could not be relied on, no fraud was established.

Third, assuming that the High Court was right in finding that the Court below had come to a sound conclusion as to the Deed not being a valid security to the Appellant and the Executors for the sum of Rs. 43,674, that Court was wrong in determining that the Lower Court had come to an erroneous conclusion as to the Deed being a valid security for the residue, and in so overruling that part of the decision of the Lower Court, the High Court reversed the finding on an issue of fact contrary to the evidence; but we insist that that Court was in error in holding that the Deed was one to which the principles laid down in the case of *Garrad v. Lord Lauderdale* (a) were applicable. The Deed being one that could not be revoked by the settlor without the sanction of the *cestui que* trusts, of whom the Appellant was one. In *Preddy v. Rose* (b) it was held, that Trustees who had no notice of an assignment were entitled to retain dividends in satisfaction of a covenant in a marriage settlement to pay a certain sum of money. Again, the Court ought not to have declared that the Plaintiffs were, on the death of *Hurrosoondery Dabee*, entitled to an absolute estate in possession of one undivided moiety of the real estate, and of the rents and profits thereof, but if any decree could be made

(a) 3 Sim. 1.

(b) 3 Mer. 86.

for the Plaintiff in the suit, it ought to have been one declaring that the Plaintiffs as the purchasers of the right, title, and interest of *Obhoychurn Bonnerjee*, and as such purchasers, was entitled only to a decree for redemption of the moiety of the premises, upon payment of the moneys due under and by virtue of the Deed. Independently, however, of the Deed, the Appellant was entitled to the first charge upon the share of *Obhoychurn Bonnerjee*, for any moneys due by *Obhoychurn Bonnerjee* to the estate of the Testator, *Doorgachurn Chuckerbutty*, and this right of the Appellant was wholly overlooked by the Court in making the decree.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Respondents, were not called on to address their Lordships.

Judgment was delivered by

The Right Hon. Lord CAIRNS :—

Their Lordships are of opinion, that the only question in this case is the validity of the Deed which the Bill was filed to set aside.

It has been contended for the Appellant that, even supposing the Deed were out of the way, the Appellant, as against *Obhoychurn Bonnerjee* and those who claim under him, would be entitled to have a lien or security upon the share of *Obhoychurn* in the estate of the Testator for any money which might be coming from *Obhoychurn* to that estate; and that the Appellant would be entitled to that security or lien, not by virtue of the contract, but upon a well-known principle of equity independent of contract.

Their Lordships have very considerable doubt

1867.

TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

1867.
 TAREENY
 CHURN
 BONNERJEE
 v.
 MAITLAND.

whether, having regard to the Will in this case, and the nature of the property, viz., immovable or real estate, any such lien could be maintained; and further, the right to maintain a lien would depend on the proof of the two debts due from *Obhoychurn* to the estate, which, if not proved for the purpose of maintaining the Deed in this case, would of course not be proved for the purpose of maintaining an equity independent of the Deed. But, putting aside those difficulties, their Lordships think that if any such lien could be introduced, or be attempted to be enforced, the attempt to enforce it could only have been made by other proceedings, viz., by a Bill in the nature of a cross-bill filed by the Plaintiff, insisting upon that equity, and undertaking to prove the facts which it would be necessary to prove in order to give effect to the equity, if the equity did exist.

Their Lordships, therefore, address themselves to consider the question of the validity of the Deed.

Now, in the first place, an objection has been made to the title of those who were the Plaintiffs in the suit below to impugn that Deed. It is said that the Plaintiffs in the revived suit represent, as they do, *Palmer*, the sole Plaintiff in the original suit; that *Palmer* was merely purchaser at the Sheriff's sale, who took a conveyance from the Sheriff of all the interest of *Obhoychurn* in the property in question; and it is contended that he and the Plaintiffs must take that interest as *Obhoychurn* held it, and that, because *Obhoychurn* could not set aside the Deed which he had executed, therefore, no more can those who claim by sale from the Sheriff.

There might be considerable foundation for that argument, if the execution had gone against *Obhoy-*

churn, and the sale had been made by the Sheriff of his property, and then, without anything more, a conveyance to the purchaser under that sale had been executed by the Sheriff. But that was by no means the case with regard to the execution we have now to deal with, because, after execution levied and before sale, the first suit was instituted which is referred to in the Bill in the present suit. That first suit was instituted by the firm of *Mackillop, Stewart & Co.*, against *Obhoychurn* and against his Mother; and the result of that was that, before any sale took place, a decree of the Court was made, by which the Court declared that the Deed in question, so far as related to the Defendants in the suit, and their respective interests and claims thereunder, was fraudulent and void as against the Plaintiffs in the suit,—reserving, nevertheless, to *Nanychurn Bonnerjee* and *Ramessur Chowdry*, the Trustees under the Deed, and to all persons other than the Defendants in the suit, all their rights and interests under or by virtue of the Deed.

Therefore, before any sale took place, there was a determination of the Court in a suit to which the Creditors were parties,—to which *Obhoychurn* and his Assignee were parties,—to which *Hurrosoondery*, the Mother of one of the parties to the Deed, was a party,—a determination that the Deed was fraudulent and void as against Creditors; and after that determination it was that the property was sold.

Now, it is perfectly clear that the object of obtaining that decision was that the property on the sale might fetch the higher price that would result from the decision, the Court having declared that the Deed in question was no impediment to a purchaser obtain-

1867.
TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

1867.
 TAREENY
 CHURN
 BONNERJEE
 7.
 MAILLAND.

ing possession of the property which had belonged to *Obhoychurn*.

Their Lordships think, therefore, that the title of the purchaser under the sale is a title which, in consequence of that decree, is in no way affected by any right of *Obhoychurn* or of *Hurrosoondery*. It is true, the decree, reserves the right, if there be any right, in third parties; notwithstanding the decree, therefore, the conveyance by the purchaser would be no impediment to third parties asserting a right, if they had a right, under the Deed. But that leaves open this question, and this only, whether any third party—the Appellant, for instance—had such a right? And upon that point their Lordships will express their opinion in their observations on the next part of the case.

Passing, therefore, from this subject of the title of the Plaintiff in the original suit to sue, their Lordships proceed next to consider the main question of fact which has been raised, and which has occasioned so much argument in the case. That is the question of fact with regard to the large debt of Rs. 43,674, professed to be secured with interest by the Deed.

Now, the learned Judges in the Courts below,—the two Judges in the primary Court and the three Judges in the Court of appeal,—have all arrived, without hesitation, at the conclusion that that debt of Rs. 43,674 was not a *bonâ fide* debt due from *Obhoychurn*; and it would be far from consistent with the rules which their Lordships have always laid down in dealing with cases of this kind for them to reverse a decision upon a question of fact thus unanimously arrived at by five Judges, unless the

very clearest proof were adduced to their Lordships that that decision was erroneous.

It is true that only the two primary Judges had before them the witnesses, or the witness, who were or was examined; but the three Judges of the Court of appeal, conversant with testimony of the kind which has to be dealt with in this case, were of opinion that the two Judges of the Court below had arrived at a just conclusion upon the evidence that was ever adduced.

But passing from the great respect which, upon a question of this kind, would be shown to the determination of the Judges below upon a question of fact, their Lordships have examined with care the whole of the evidence which was before those learned Judges, and they are of opinion, that there is no ground whatever to be dissatisfied with the conclusion at which the learned Judges arrived.

It appears that *Obhoychurn*, at an early age, had been sent by his family into the employment of Mr. *Marjoribanks*. It is clear from the evidence that Mr. *Marjoribanks* was largely indebted to the estate of the Grandfather of *Obhoychurn*, and there is abundant ground to conclude that the reason for which *Obhoychurn* was placed in the service of Mr. *Marjoribanks* was that he might, as far as possible, recover and realize for the estate of his Grandfather the debt which was due to that estate from Mr. *Marjoribanks*.

Large sums, beyond all doubt, were received by *Obhoychurn* in the course of that employment under Mr. *Marjoribanks*; nor do their Lordships intimate any doubt but that these sums, in the year 1830, had amounted to the sum of Rs. 43,674; but the question

1867.
TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

1867.

TAREENY
CHURN
BONNERJEE
7.
MAITLAND.

is, what did *Obhoychurn* do with that money? Did he appropriate it to his own purposes, leaving himself the debtor to his Grandfather's estate; or did he pay it over, from time to time, to those who represented his Grandfather's estate?

Now, the story which is told upon that subject by *Obhoychurn* appears to their Lordships to be utterly incredible. He says he received the money. He admits that he did not pay it over, but he is unable to account in any satisfactory way for his application of the money,—as to how he employed or spent it, or as to where he invested it; and it is extremely difficult to believe that those who sent this young man into the employment of Mr. *Marjoribanks* for the purpose of obtaining payment for his Grandfather's estate of the money in question, should have taken no care to secure that money as it was received by *Obhoychurn* from time to time.

There are certain Exhibits, the genuineness of which is not challenged, and which are appealed to by the Appellant in corroboration of the statement which he has made. But assuming that *Obhoychurn*, from time to time, received from Mr. *Marjoribanks* the amount of Rs. 43,674 for the purpose of satisfying the debt due by Mr. *Marjoribanks* to his Grandfather's estate, and assuming that Mr. *Marjoribanks* owed that amount at one time to the Grandfather's estate, these Exhibits are really nothing more than the formal record or evidence which might be made, or might be preserved, as between Mr. *Marjoribanks* and the Grandfather's estate, at the close of their dealings in 1830.

Mr. *Marjoribanks* commences by writing a letter on the 25th of *March*, 1830 to *Obhoychurn*, in which

he desires him to bring up his private account with him, Mr. *Marjoribanks*, and compare it with his Books; he says it must be rather large against *Obhoychurn*; however, he adds: "We shall have no difficulty in coming to a settlement."


1867.
TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

These are expressions by no means inconsistent with *Obhoychurn* having been, from time to time, receiving moneys which otherwise would have belonged to Mr. *Marjoribanks* for the purpose which has been referred to.

It appears that a few months afterwards, on the 21st of *August*, 1830, Mr. *Marjoribanks* wrote a letter, addressed to *Obhoychurn*, desiring him to pay to the two acting Executors of his Grandfather's estate, Rs. 43,674—to pay that sum to the Executors—not to pay it to their order, and not, in point of fact, making any negotiable instrument for the payment of the amount. Mr. *Marjoribanks*, it appears, sent that order to the two acting Executors, and it reached their possession. At the same time, Mr. *Marjoribanks* wrote a note to *Obhoychurn* in these terms:—"On paying *Goureechurn Bonnerjee* and *Bissonath Muttyloll*, Executors to the estate of your Grandfather, the draft I have given them for S.Rs. 43,674, all accounts between us are settled."

The acting Executors, in whose favour the draft was made, appear to have signed their names on the back of it, and to have handed it over to *Obhoychurn*, and at the same time to have given to *Obhoychurn* two Bonds from Mr. *Marjoribanks*, by which Mr. *Marjoribanks* had become bound to the estate of the Grandfather for a sum almost the same in amount as that for which the draft was made.

Now, it appears to their Lordships entirely con-

1867.

 TAREENY
 CHURN
 BONNERJEE
 v.
 MAITLAND.

trary to what would be, and what must be presumed to be, the natural course of business on such an occasion, to suppose that these Executors would have handed back this draft endorsed by themselves to *Obhoychurn*, and to have handed over to *Obhoychurn* the evidence which they had against Mr. *Marjoribanks* of the debt due from Mr. *Marjoribanks* to the estate, thereby releasing Mr. *Marjoribanks*, and thereby putting in the hands of *Obhoychurn* the evidence of any sum due from Mr. *Marjoribanks*, unless, in point of fact, the estate had at that time received payment in some shape or other of the whole of the sum of Rs. 43,674.

Again, passing from the year 1830, and going down to the year 1843, when the Deed was executed, it appears to their Lordships incredible that those who were interested in protecting the estate of the Grandfather, would during that period have remained perfectly quiescent, taking no security and exacting no payment from *Obhoychurn* in respect of that amount, if the amount really were due from *Obhoychurn*.

The Books of *Obhoychurn* have been produced. They appear to have been appealed to on behalf of *Tareeny Churn Bonnerjee*, and it is possible that under an Act of the Legislature on the subject, they might have been admissible, but, if so, only as corroborative evidence of the testimony of *Obhoychurn*; and their Lordships do not dissent from the view of the learned Judges below, that if they are right in concluding that the evidence of *Obhoychurn* is not to be received as truthful, neither can these Books kept by *Obhoychurn* be considered as satisfactory evidence of that which when taken by itself is not more credible.

Their Lordships, therefore, agree with the learned Judges that there is no evidence whatever which can be relied upon that this sum of Rs. 43,674, which, with the interest thereon, is part, and a very large part, of the amount secured by the Deed, was a *bonâ fide* debt due from *Obhoychurn*.

Now, this question of fact being once determined, the consequence appears to their Lordships to be inevitable. They are compelled, arriving at this conclusion of fact, to hold that the Deed professing to secure that amount on the estate of *Obhoychurn* was a Deed executed with intent to defraud and delay the Creditors of *Obhoychurn*. He was much pressed by his Creditors at the time the Deed was executed, and insolvency supervened very shortly afterwards.

But then it is said that the Deed secured the further sum of Rs. 13,873, and that there is nothing to impeach the statement that this was a debt due from *Obhoychurn* to the state of his Grandfather, and that the Deed, therefore, at all events, should stand as a security for that amount.

It appears to have been considered by the Court below that on the principle of the appropriation of payments, it might be taken that there were payments on the opposite side of the account which would wipe out this lesser sum. But their Lordships do not rest their decision upon that ground. If the Deed was executed with a view to defraud and delay Creditors, and if the facts which have been referred to with regard to the sum of Rs. 43,674 are sufficient to show the Deed was executed with that intent, it appears to their Lordships to be utterly impossible for any party to that Deed, or any person

1867.

TAREENY
CHURN
BONNERJEE
v.
MAITLAND.

1867.
 TAREENY
 CHURN
 BONNERJEE
 v.
 MAITLAND.

claiming under those who were parties to that Deed, to maintain the Deed for any purpose whatever.

The Deed is one which, in that view of the case, is not executed to secure the Rs. 13,873, but it is a Deed executed to defeat and to delay Creditors; the Deed, therefore, utterly falls to the ground, and cannot be maintained, as their Lordships think, as a security for any sum whatever.

Upon the question of the form of the decree, their Lordships, agreeing entirely with what has been done by the Court below in point of substance, consider that the decree has, in point of form, gone too far in providing for the cancellation of the Deed, the Plaintiff in this suit not being interested to cancel the Deed as a whole, but being interested only to remove the Deed out of the way of the assertion of his own rights in regard to the property which he has purchased; and their Lordships think that portion of the decree which retains the Deed for cancellation should be omitted.

Their Lordships, therefore, with that alteration, will humbly recommend to Her Majesty to affirm the decree in other respects, and to dismiss the appeal; and the alteration their Lordships have made is not of that kind which, according to their general rule, would induce them to vary their view with regard to the general costs, therefore, they will humbly recommend that the appeal be dismissed with costs.

By an Order in Council, it was ordered, that the decree of the High Court in its appellate jurisdiction be varied by striking out the words "and it is ordered that the said Indenture be retained by the Registrar for the purpose of being cancelled," and that in all other respects the decree be affirmed, with costs.

GUNGA GOBIND MUNDUL and others *Appellants ;*

AND

THE COLLECTOR OF THE TWENTY-
FOUR PERGUNNAHS and others ... } *Respondents.**

*On appeal from the High Court of Judicature at
Fort William, Bengal.*

THE suit out of which this appeal arose, was instituted by the Collector of the Twenty-four *Pergunnahs*, to recover the possession of 21 *beegahs* 8 c. 4 c. of land, in *Mouzah Chandpoor, Pergunnah Khaspore*, in the District of the Twenty-four *Pergunnahs*, of which the Appellants were in possession.

The Collector's case in the Court below, and on appeal, was, that the land was *Mal* (rent-paying) land,

° Present :—Members of the *Judicial Committee*—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

Government claims the land, he cannot avail himself of the right of prescription of sixty years to resume and assess the land, on the footing of the relation of Landlord and Tenant between himself and the Government. So held by the Judicial Committee, reversing the decree of the High Court at *Calcutta*, in an ejectment suit instituted by Government for possession of lands situate in the Twenty-four *Pergunnahs*, alleged to be held by *Mal* and not *La-khiraj* tenure.

The provision of the Code of Civil Procedure (Act No. VIII. of 1859, sec. 355), which requires the Judges who admit fresh evidence on an appeal, to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought to be strictly complied with.

The cases of *Gardiner v. Fell* (1 Jac. & Wal. 22) and *Freeman v. Fairlie* (1 Moore's Ind. App. Cases, 305), recognized and supported.

22nd, 25th, &
26th Feb., &
4th March,
1867.

Where the claim to land in the Twenty-four *Pergunnahs* in possession of another, is barred by the twelve years' prescription, provided by Ben. Reg. III. of 1793, sec. 14, his title is extinguished, and although a party to a suit in which the

1867.

GUNGA
GOBIND
MUNDUL7.
THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

in respect of which the Government was receiving rent, and was not *La-khiraj*.

The Appellants, in answer, contended first, that the Collector did not establish this fact; secondly, if so, the Regulations of limitation of suits from long possession was a bar to the suit; and thirdly, that in any event, as the Government alleged that they were then actually in receipt of rent in respect of the land, the Collector was not entitled to maintain an action of ejectment to recover possession.

The facts, in substance, were these:

The land in question, is part of the Twenty-four *Per-gunnahs*, of which the Government is *Zemindar*, and was purchased by the Appellants' ancestors in 1826, for Rs. 26,200, as *La-khiraj*, and they had been in quiet possession of it ever since. It appeared that, before this purchase, the land belonged to one *Bandopadhia*, and before his purchase, it was for many years the property of *John Burrows* and his father *Reuben*, who acquired it from one *Richard Johnson*, who was admitted to have been the holder of it in the year 1783. From that year downwards, *Johnson*, the *Burrows* family, *Bandopadhia*, and the Appellants and their ancestors successively held the land and received the rents; they dealt with it as *La-khiraj*, and no rent was ever assessed upon or paid in respect of it to the Government. At the time when *Johnson* held the land in 1783, it formed the northern portion of a *dagh* (block) of land, then measured at *beegahs* 46: 0: 10. Another portion of which *beegahs* 46: 0: 10, to the immediate south of and abutting upon it, was, after the purchase by *Reuben Burrows*, and in the year 1787, sold to a Colonel *Wilford*, who in the year 1815 devised it to *Beebe*

Khanum, and that land had also always been dealt with as *La-khiraj*, and no rent paid to the Government in respect of it.

In the year 1857, a claim was set up to 21 *beegahs* of the land by one of the Respondents, Prince *Gholam Mahomed*, who claimed the proprietary right in it, as having purchased it and other land, amounting altogether to *beegahs* 42 : 16 : 8, from one *Robert Brown*, in 1855; and he instituted against the Appellants and the Government three suits to obtain possession of such land. In those suits the Prince alleged that the land in dispute was *Mal* land, held formerly under a *Pottah* by the Government to one Colonel *Green*, the predecessor in title of *Brown*, the Prince's vendor, and alleged that in 1856 the Government had granted him a *Pottah*.

The Appellant, *Gunga Gobind Mundul*, by his answer in the suits, set out his title, relying as well upon the facts before stated attending the acquisition of the land as upon the *bona fide* length of possession, and alleging that a lease of part of the land had been granted by one of the *Burrows* to one *Chedam Ghose* at least as far back as the year 1811, and under which the land had been always treated as *La-khiraj*, had been purchased as such by the Prince *Gholam Mahomed* in the year 1833; and had, in the receipts for rent taken by him, been invariably described as *La-khiraj* land.

At this stage of the proceedings the Prince *Gholam Mahomed* applied to the Revenue Commissioner by a petition, dated the 10th of *May*, 1860, praying that the Government might be made a co-Plaintiff with him, or that a separate suit might be instituted on behalf of the Government, and tried with the three suits,

1867.

GUNGA
GOBIND
MUNDUL

v.

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

1867.

GUNGA
GOBIND
MUNDUL

v.

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

engaging to pay the costs of the Government in any such proceedings. The Commissioner, however, refused to sanction any such course; when the Prince applied to the Collector of the Twenty-four *Pergunnahs*, who acceded to it, and on the 13th of June, 1861, instituted a suit on the part of the Government of India, in the Civil Court of *Zillah* Twenty-four *Pergunnahs* against the Appellant, *Gunga Gobind Mundul*, and others, making Prince *Gholam Mahomed* a *pro forma* Defendant, to recover possession of 21 *beegahs*, 8 *cottahs*, 4 *chittacks*, being the northern portion of 42 *beegahs*, 16 *cottahs*, 8 *chittacks*, of land, in *Saheban Bagecha*, Holding No. 1, appertaining to *Mouza Chandpore*, in *Pergunnah Khaspore*, the Government *Khas Mehal*, by overruling the plea of rent-free tenure, and by maintaining the *Mal* right. The plaint stated the particulars of the case on the part of the Government, and the claim of the Defendants to hold the lands rent free, and it prayed that the suit might be decided simultaneously with the three suits brought by the Prince.

The Appellants, *Gunga Gobind Mundul* and *Romani Dossee*, by their answers, which were in substance the same, insisted, first, that the suit should be dismissed as barred by adverse possession, under *Ben. Reg. II.* of 1805; secondly, that the Government could not adopt resumption proceedings in respect of lands of less area than 100 *beegahs*; and thirdly, that the Government, being in receipt of the rents, had no cause of action; and they insisted that the lands in dispute were their own property and rent free; that before the year 1790 Mr. *Johnson* purchased about 35 *beegahs* of *La-khiraj* lands in *Chandpore*. That Mr. *Johnson* sold the lands in dispute,

which formed the northern part of those 35 *beegahs*, to Mr. *Burrow*, who, by a Will, dated the 2nd of *August*, 1792, left the property to his son, *John Burrow*; that on the 22nd *Bhadro*, 1233 B.S. (6th *September*, 1826), *John Burrow* sold to *Huranundo Badhopadhia* (called also *Haranund Banorjia*), and on 2nd *Kartick* (17th *October*) in the same year, *Haranundo* sold to *Oodoynarain Mundul* and *Hurnarain Mundul*; that *Gunga Gobind Mundul* was the heir of *Oodoy Narain* and *Romona Dossee* of *Hurnarain*. The answer also alleged, that the lands to the south of the lands in dispute were sold by Mr. *Johnson* to *Welford*, on the 1st of *February*, 1787, who gave them to *Khanum Jaun*, from whom they were purchased by *Chunda Churn Biswas*.

The other Defendants, who claimed 5 *cottahs* within the disputed lands, by their answer raised the same objections as were raised by the above Appellant, and they alleged that the lands claimed by them were purchased on 12th *Poos*, 1244 (1837), from the widows of the two sons of *Anundo Chundro Tewanee*, who was, as they alleged, the son and successor of *Gungaram Tewanee*, and they alleged that 3 *beeghas* 4 c., of which the 5 *cottahs* formed part, were rent-free lands.

The issues for trial were fixed by the Judge of the *Zillah* Court, when the Judge expressed himself as follows:—"This is simply an ejectment action. We have to determine whether the lands are within or beyond the boundary of Holding No. 1, as set forth in the plaint, and, therefore, in the present ejectment suit, no question of resumption can be entered into. The case being dealt with as one of boundary, the only interruption to which action will be, adverse

1867.

GUNGA
GOBIND
MUNDUL7.
THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

1867.
 GUNGA
 GOBIND
 MUNDUL
 v.
 THE COLLEC-
 TOR OF THE
 TWENTY-
 FOUR PER-
 GUNNAHS.

possession, with the *onus* of proof upon the Defendants setting up the plea. In bar, that the action of the Plaintiff is estopped by the limitation of time. On the merits. For the Plaintiff, that the lands are within the Holding No. 1, the property of Government. For the Defendants, that the lands are not within the boundary of Holding No. 1; but *La-khiraj* lands distinct from the *Mal* lands of Government.

The evidence taken in the three suits by the Prince Respondent, were referred to in the suit by the Collector.

That suit came on for hearing on the 28th of *December*, 1861, before the Civil Judge, *E. Latour*, Esquire, who had inspected the lands in dispute in person, and made a skeleton plan from such inspection. That Judge, after stating that the subdivisinal holdings first began about 1833, was of opinion, that there was not sufficient evidence to identify the lands in dispute with those in Holding No. 1, in respect of which alone rent had been paid, and gave judgment against the Collector on both issues in his suit, and also against the Prince in his three suits.

Against this decision the Collector and the Prince appealed to the *Sudder Dewanny Adawlut*.

On the 13th of *August*, 1862, the Collector presented a petition, praying that certain Exhibits, including the original Register, Book for the year 1816, might be received in evidence.

The Register Book was not, however, produced until the hearing of the appeal, and it was then found to contain entries which purported to show that the quantity, 46 : 0 : 10, was the quantity mentioned in the

Chittahs of 1783 (but which appeared in no other Government Record, either before or after the year 1816) was included in a Rent Bill under the *Jumma* of Rs. 39: 13, mentioned in the *Terij* papers of 1833. These entries were at the end of the Book.

The appeal was heard before Sir *Charles Jackson* and *W. S. Seton Karr*, two of the Judges of the High Court of Judicature, and on the 23rd of *January*, 1863, the Court gave judgment declaring the Government entitled to possession of the disputed property, with costs of suit, but dismissing with costs the three suits instituted by the Prince *Gholam Mahomed*. The effect of the *Chittahs* of 1190, the Register Book of 1815 and 1816, and a Map of 1845 was fully considered in the judgment. With respect to the Register Book the judgment went on to say, "We were referred to the signature of the Collector in these pages of the Book as suspicious, but we have inspected the Book, and have satisfied ourselves that the signatures corresponded with the other signatures of the Collector in the preceding entries, and on the whole we see no reason to doubt the genuineness of the Register Book." On the whole, the Court found that Lot No. 1 was the same property as that mentioned in *Dagh* No. 1, and that the property in *Dagh* No. 1 was the same as was transferred by *Johnson* to *Green*, and from *Green* to *Brown*, and from him to the Prince. The Court then proceeded to consider whether the Appellant, whose case was a mere assertion of a *La-khiraj* title, and who could not, therefore, be presumed to have been in possession before 1790, was entitled to set up the defence of the Regulation of Limitation of suits as against either the Government or the Prince. As against

1867.

GUNGA
GOBIND
MUNDULv.
THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

1867.

GUNGA
GOBIND
MUNDULv.
THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

the Government, the Court was of opinion, that he had clearly no right; first, because the Government had sixty years allowed them, and the suit had been instituted by them within that time; and secondly, because a party relying on a *La-khiraj* tenure was not allowed to set up a plea of limitation when he could not show a *La-khiraj* title before 1790, the Revenue Law of the country treating all such tenures as absolutely null and void. The Court was, however, of opinion, that the Defendants were entitled to set up the plea of limitation as against the Prince.

The Appellant, *Gunga Gobind Mundul*, presented a petition for a review, upon the ground that, as the Register Book of the years 1815 and 1816 was filed for the first time in Court on the day of trial, he had had no opportunity to search for, and procure certain documents, which were filed with the petition, and which would, as the Petitioner alleged, show that the entries in the Register Book, relied upon by the Court, were false and fabricated.

The petition for review came on to be heard in the High Court, on the 13th of *April*, 1863, before *W. S. Seton Karr*, who refused the application with costs. As regarded the objections urged against the Register Book, and the weight to be attached to the documents, filed with the petition, the Judge stated his opinion, that "when we heard this appeal in *January* last, some new evidence, not adduced before the Lower Court, was presented to us on appeal, in the shape of a Register Book of the proprietors of land in the Government *Khas Mehals*, situate in this part of the Twenty-four *Pergunnahs*, dated the years 1815, 1816. This Book was then admitted by us on the testimony of the Collector of the Twenty-four

Pergunnahs, who satisfactorily accounted for its custody, and for its non-production up to that time. A very careful re-inspection of the Register Book has quite satisfied me that, as a whole, it is genuine, and to be depended upon. It was produced by the proper Officer, and from its proper place. It is quite according to practice that there should be such a register of proprietors ; the successive entries are in order of date ; they show briefly the particulars of each application for transfer, and mention the title deeds, with names and dates, and they bear the legible signatures of the successive Collectors appended to order, directing that transfer should be recorded, and new *Pottahs* should be made out. So far, as a whole, the Book must be taken to be genuine, and of unquestionable authority. This being the case, and the entry in the Registry not being shaken by the new evidence, any further evidence could not carry a case for review one step further."

Against the decree of the 23rd of *January*, 1863, the present appeal was brought.

Mr. *Field*, Q. C., and Mr. *Pontifex*, for the Appellants.

The evidence adduced to prove the identity of Holding No. 1, of 1833, with *Dagh* No. 1, of the *Chittah* of 1783, is altogether insufficient and untrustworthy, and in fact no such identity existed. The Register Book of 1815-1816 was improperly admitted as evidence. The entry there of a *jumma* in *Green's* name is the only fragment of evidence in the suit. If it was a genuine document, why was it not produced earlier? The entry bears on the face of it evidence of its being fabricated to meet the case.

1867.

GUNGA
GOBIND
MUNDULTHE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

1867.

GUNGA
GOBIND
MUNDUL

7.
THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

The Respondents' title to the land as *Mal*, was not proved; for the entries in the Registry Book only amount to a presumption of a conveyance, but are no proof of title; on the contrary, the evidence established the Appellants' title; it shows that the land in dispute has for more than sixty years been in the actual uninterrupted rent-free enjoyment of the Appellants and their predecessors in title. It is to be regretted that the difficulties which the Appellants' case in the Court below presented to the Respondent, the Prince *Gholam Mahomed*, in his three separate suits, induced the Government to take up his case, and on their part to bring a suit against the Appellants for possession only, without seeking a declaration of their right to assess as *Mal* tenure. The unfairness of this proceeding cannot be too strongly condemned. The Appellant and his ancestors at that time had been in *bonâ fide* possession as purchasers for more than thirty years, and the Prince's claim was absolutely barred by the *Ben.* Regulations of Limitation of Suits, III. 1793, sec. 14; VII., 1795, sec. 8; and II. of 1803, sec. 18. To avoid the effect of those Regulations he has been allowed to shield himself under the claim of the Government, who assert, contrary to the fact, that the lands were never *La-khiraj*, but *Mal* tenure, and that the prescription of sixty years prevail. *Maha Raja Dheeraj Raja Mahatab Chund Bahadoor v. The Bengal Government* (a). If the Government, as they allege, are in actual receipt of the rent of the Holding No. 1, the present suit is not maintainable. A Court of equity will not give relief by making a declaration as to a claim which may be made by another under

(a) 4 Moore's Ind. App. Cases, 466.

circumstances that may or may not happen: *Jackson v. Turnley* (a), Code of Civil Procedure, ch. I., sec. 15.

Mr. *Forsyth*, Q. C. (with whom was Mr. *Macnaghten*), for the Collector of the Twenty-four *Pergunnahs*.

1867.

GUNGA
GOBIND
MUNDUL

v.

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

First. The title of the Government to the land in dispute was sufficiently proved. The right of the Government to the Twenty-four *Pergunnahs* is distinct from their sovereign rights in *India*. These *Pergunnahs* were in the year 1764 given as a *jaghire* by the then ruling power to Lord *Clive*, and on his death in 1775 came to the East India Company as *Zemindars* 5th Rep. East Ind. Comp. pp. 407, 410. The Twenty-four *Pergunnahs* differ from the ordinary relation between the Government of *India* and their subjects. In ordinary circumstances, the *Zemindar*, is the Farmer who pays the revenue to Government, and collects it from the *Ryots*, the cultivators of the soil, but in the Twenty-four *Pergunnahs* there are no *Zemindars* to pay the revenue to the State, the Government is the *Zemindar*, and as such capable of granting Leases or *Pottahs*, and had full right to grant the *Pottah* to Prince *Gholam Mahomed* of the lands in question. The Court below has complicated the case by treating it as one of *La-khiraj* and not *Mal* tenure, but the case really is one of boundary, and the Appellant has failed to prove that the land in dispute was, as he insists, rent-free, or that it was ever granted or registered as *La-khiraj*, as he was bound to do if the claim could be sustained. The *Burdwan* case (b);

(a) 1 Drew, 617.

(b) 4 Moore's Ind. App. Cases, 466.

1867.

GUNGA
GOBIND
MUNDUL

v.

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

Regs. XIX. of 1793, sec. 22; II. of 1819, sec. 28. Secondly, the Registry Book of 1815-1816 was properly admitted in evidence on the appeal. There it is shown that *Green*, through whom Appellants claim, paid a *jumma*, and that identifies the land in question. [Lord *Romilly*: What privity is there between the Appellants and the person making such an entry in the Book? Such entry cannot be admitted as evidence against them.] The Books came out of the proper Officer's custody, and must be presumed to have been regularly kept. All the evidence goes to show the identity of the land with the description in the Register. Then, lastly, unless the Appellant can show the adverse possession without payment of rent for a period of sixty years, the claim of the Government's right to sue is not barred. Reg. II. of 1805.

Sir *R. Palmer*, Q. C. (with whom was Mr. *Leith*), for Prince *Gholam Mahomed*.

With regard to the Appellant's objection to the Government suing on behalf of this Respondent, the answer is, that he stood as to them in the ordinary relation of landlord and tenant. Under the *Pottah* of 1856 from Government he had all the right the Government could give; he was, therefore, clearly entitled to rely upon the Government's prescription, and his right to sue was not barred by the Regulations of Limitation II. of 1805, or by the Appellants' possession for twelve years. The land in question is proved to be within the Government *Zemindary* of the Twenty-four *Pergunnahs*, and the alleged *Lakhiraj* tenure set up and relied on by the Appellants was not established by the evidence, as was necessary.

Maha Raja Dheeraj Raja Mahatab Chund Bahadur v. The Bengal Government (a).

Their Lordships, without calling for a reply, delivered judgment by

The Right Hon. Lord ROMILLY.

This is an appeal from a decree of the High Court of Judicature, at *Calcutta*, which reversed a decision of the Civil Court of the Twenty-four *Pergunnahs* in favour of the Appellants. The suit, the decision in which gives rise to the present appeal, was brought by the Collector of the Twenty-four *Pergunnahs* on behalf of the Government of *India*, against *Gunga Gobind Mundul*, and *Sree Mutty Rurmonee Dossee*, described as Defendants, and Prince *Gholam Mahomed* and certain other persons, members of the *Mundul* family, named in the plaint, and described as the occupiers of five *Cottahs* of the disputed land, who, together with the Prince, are also described as *pro formâ* Defendants.

The Prince, though called a *pro formâ* Defendant, is really one of the persons principally interested in the subject in dispute. His title is adverse to that of the *Munduls*, and he is making common cause with the Collector. On what ground he is inserted as a Defendant, it is not easy to discover.

The Prince had instituted three suits for the recovery of the property which is the subject of this suit, against the Appellants. He divided his claim into three suits, in conformity to the rules of procedure established in the Courts of the country, in consequence of the separate interests of different

1867.

GUNGA
GOBIND
MUNDUL
v.
THE COLLECTOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

(a) 4 Moore's Ind. App. Cases, 466.

1867.

GUNGA
GOBIND
MUNDUL,v.
THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

members of the *Mundul* family, in portions of his property, of which his claim embraced the whole. The suits of the Prince, numbered 43, 44, and 45 of 1857, raise precisely the same question as that which is raised in the suit of the Collector before mentioned, viz. whether the lands sought to be recovered formed part of holding No. 1, and were part of that portion of Colonel *Green's* estate, which, as the Prince contends, has passed to him by title. In all the four suits, the decision was against the Plaintiffs in the Civil Court. In the judgment of the High Court it is stated, "It has been admitted by the Counsel on both sides, that in the Court below all parties agreed that this appeal (that is, the appeal in the Collector's suit) and appeals Nos. 122, 123, and 124 (that is, in the Prince's suits) should be heard together and treated as one consolidated case, and that all the evidence should be taken as in one cause."

In the Collector's suit alone is there any appeal. That suit, though it asks "a declaration overruling the plea of a rent-free tenure," which is not properly the subject of that jurisdiction, is properly treated in the Civil Court as an ejectment suit, and it was admitted by Mr. *Forsyth*, who appears for the Collector, to be a suit in the nature of an ejectment suit. For such a suit, which supposes that the Plaintiff was put out of possession, it is necessary for him to allege and prove his title to the possession. The Collector sues for the Government, being entitled to sue to enforce their claim to the possession. It appears, however, in this suit, that both the Prince *Gholam* and the first and second *Munduls* claim derivatively from the same person, *Johnson*; the judgment of the High Court finds, as a fact, that

"the property was originally the property of *Johnson*." By this word "property" here, is evidently meant absolute ownership; though it may be by a grant from the East India Company, as the *Zemindars* of the Twenty-four *Pergunnahs*. The well-known cases of *Gardiner v. Fell* and *Freeman v. Fairlie* (1 Moore's Ind. App. Cases, pp. 299 and 305), and the observations of Lord *Lyndhurst* in the latter case on the subject of *Pottahs*, exclude any supposition that such absolute ownership of lands by private persons could not exist at that time in that part of *India*, as against any claim of the Government to possession of the lands. In the latter case, his Lordship terms "the rent" "a *jumma* or tribute," and says "the *Pottah*" therefore, proves no part of the title, it is the conveyance that gives parties a right to claim the *Pottah*." The *Pottah* is evidence of title. If there were anything in the nature of the title of the Government to lands in the Twenty-four *Pergunnahs*, or any usage or custom in force there, which gave a less permanent interest to the possessors of proprietary right, some authority for, or some evidence of such a variation from, and limitation of the general law, should have been adduced to their Lordships. Their Lordships themselves are aware of nothing to take these titles out of the operation of the principles established by the cases above referred to; consequently, upon the evidence in this suit, it appears that the Government had not, at the time of *Johnson's* possession of block No. 1, any title to the possession of these lands. If, as the Government contend, these lands were rent-paying lands, the title of the Government was simply

1867.

GUNGA
GOBIND
MUNDUL

7.

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

1867.

GUNGA
GOBIND
MUNDUL

7.

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

ment rather resembles a seignory than that of a lessor with a reversion.

In the Civil Court, the title of the Collector to sue was put upon the ground of the relation of landlord and tenant; and of the right of the landlord to sue in order to protect his tenant, and to assert his title as landlord. But such is not the real relation between the parties which the evidence discloses. Prince *Gholam* took, by conveyance, from *Brown*; he states his title to have been derivative from *Johnson*, who conveyed to *Green*, who conveyed to *Brown*, who conveyed to the Prince a title to the absolute ownership never interrupted.

There is no relation of Landlord and tenant in such a case between the Government and the owner of the lands, who is the landlord, and not a *Ryot*. The Government has a title to the rent or *jumma*. By whatever name it be called, the right and title is to the rent substantially; it does not include a right to the possession of the lands, though such a right might arise by forfeiture, or extinction of the ownership.

It is of the utmost consequence in *India* that the security which long possession affords should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands,—contiguous owners are apt to charge one another with encroachments. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may take that title in safety; but, if the party out of possession could set up a sixty years' law of limitation, merely by making common cause with a Collector, who could enjoy

security against interruption? The true answer to such a contrivance is, the legal right of the Government is to its rent; the lands are owned by others: as between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years; after that time, it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor. The Government has no title to intervene in such contests, as its title to its rent in the nature of *jumma* is unaffected by transfer simply of proprietary right in the lands. The liability of the lands to *jumma* is not affected by a transfer of proprietary right, whether such transfer is affected simply by transfer of title, or less directly by adverse occupation and the law of limitation.

Their Lordships are, therefore, of opinion, that this dispute as to the identity of the lands, which is substantially the cause of action of the Prince alone, cannot be kept alive longer than the legal period of limitation of twelve years, by the expedient of inducing the Collector to make common cause with him. The judgment appealed against says, "if the Government recover against the Defendants, the Prince substantially recovers also." But the Prince has never surrendered or intended to surrender his estate to the Government. He has simply taken a new *Pottah*; that *Pottah* is not the title, but the evidence of title. If the title of the Prince to possession was inconsistent with a title in the Government to the possession, and the law of limitation has extinguished that title of the Prince in favour of the *Munduls*, the Defendants, their Lordships are entirely at a loss to see in the arrangement between

1867.

GUNGA
GOBIND
MUNDUL

v.

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

1867.

GUNGA
GOBIND
MUNDUL

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

the Collector and the Prince, any ground in law or equity for making a decree which substantially restores him to what he has lost by laches, supposing the title under which he claims to have been originally good.

If, however, it were considered that the Collector could sue for the possession of the lands upon the title shown to be in the Prince, or that the Prince, by reason of the suit being in the Collector's name, could get the benefit of the sixty years' limitations; the question whether the Respondents have proved a title sufficient to evict the Appellants from the lands in dispute would still remain to be decided. The Collector rests on the title of the Prince. That title is derivative through mesne transfers from *Johnson*. The place, the *Sahiban Bageecha*, is said to have been the residence of European Gentlemen. It seems probable that both *Johnson* and *Green* were British subjects; if they were British subjects these lands could not have been orally conveyed by *Johnson* to *Green*. It is not shown, therefore, by the Plaintiff, on whom the burden of proof lies, that the entries in the Register could of themselves operate as a conveyance. They must, at the highest, amount only to evidence from which, with other matters, a conveyance might be presumed. Had the possession of the lands been enjoyed by virtue of and consistently with the title asserted by the Plaintiffs, there would have been legal grounds for making such a presumption; but there has been a long adverse possession, and there is no sufficient proof of a contemporaneous possession consistent with the title insisted on by the Plaintiffs. The presumption of a conveyance is resorted to, when such presumption is made, to sup-

port a long possession ; but here it would be applied to defeat a long possession. If possession be not consistent with a title, which is to be supported by a presumption of a former conveyance, that very possession would furnish ground for building another presumption on the first, viz. of a subsequent re-transfer or reconveyance. In such a case, therefore, as the present, the defective link in the claimant's title cannot, in the opinion of their Lordships, be supplied by presumption. Then, as 'it is not shown that these lands could have been transferred orally, and as no direct evidence exists of a conveyance, and as the state of the possession does not support a presumption of one having existed, the question which is asked by the Judge of the Civil Court as to the missing link, is at once pertinent and unanswered. Again, the title from *Green* to *Brown*, the immediate vendor to the Prince, has not been traced or proved. It has been assumed that it is sufficient for the Respondents to establish that the lands were part of the rent-paying lands comprised in Holding No. 1. But even this fact has not, in their Lordships' opinion, been satisfactorily made out. Both parties agree that the lands in dispute lie in block No. 1, which, by the *Chittahs* of 1783, appears to have belonged to *Johnson*, and to have contained 46 *beegahs* 10 *cottahs*. The inference which the Respondents draw from the Register Book at page 213 is, that this parcel of 46 *beegahs* 10 *cottahs*, was subject to a *jumma* of Rs. 39. 13a. ; that it had been transferred, before 1816, from *Johnson* to *Green* ; that a fresh *Pottah* for it was then granted in the name of *Green* ; and that it is identical with the joint holding mentioned in the

1867.

GUNGA
GOBIND
MUNDUL

v.

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

1867.
 GUNGA
 GOBIND
 MUNDUL
 v.
 THE COLLEC-
 TOR OF THE
 TWENTY-
 FOUR PER-
 GUNNAHS.

Terij of 1833 under the head of *Pergunnah Khaspore*. It is, however, clear on the face of the *Terij*, that that holding had been supposed to comprise only 30 *beegahs*; that on a remeasurement it had been found to comprise 42 and a fraction; and that in consequence of the remeasurement the *jumma* of Rs. 39. 15a. had been raised to Rs. 56. 14a. 1p. But no satisfactory or consistent explanation has been given how or why a holding which, in 1816 was taken to contain 46 *beegahs* 10 *cottahs*, and as such was assessed at Rs. 39. 15a., was at some intermediate period between that date and 1833 taken to contain only 30 *beegahs*; and having, on remeasurement, been found to contain 42 *beegahs* and 16 *cottahs*, was treated as subject to a higher *jumma* than that assessed upon it when it was supposed to be 46 *beegahs* 10 *cottahs*. Mr. *Forsyth* thought that there must have been two measurements, of which the first, being inaccurate, had reduced the quantity of land to 30 *beegahs*,—and that the first estimate of 46 *beegahs* 10 *cottahs* was a conjectural one. It does not, however, seem probable that if this original estimate had been tested by measurement, the measurement would have been so inaccurately made. Again, Sir *Roundell Palmer's* theory is that the original block No. 1 may have contained some 16 *beegahs* and 10 *cottahs* of rent-free lands; that the rent-paying lands were, therefore, taken to be only 30 *beegahs*, but were found, on remeasurement, to be 42 *beegahs* and 16 *cottahs*. This theory implies that block No. 1 contained, in fact, about 59 *beegahs* of land. The learned Judges of the High Court admit the difficulty, but say that it is not insuperable, and seem to incline to some.

such explanation as that offered by Mr. *Forsyth*. These hypotheses, which are not consistent, are all, in their Lordships' opinion, of too conjectural a character to be received in explanation of an admitted difficulty, in order to defeat a title founded on long possession. It may be observed, too, that all of them, and indeed the Register Book itself, are not consistent with the case made by the Collector in his plaint, which is founded upon the transfer of the 46 *beegahs* 10 *cottahs*, less 3 *beegahs* and a fraction, from *Johnson* to *Green*. The question of the identity of these lands appears to their Lordships to be one of extreme doubt and difficulty. They are by no means prepared to say that the Appellants have made out that the lands in dispute are identical with the parcels of the conveyance under which they claim title; or have proved a title under which they could recover if they were out of possession. But the burden of proof is on the Respondents,—it is for them to establish, by sufficient and satisfactory evidence, the identity of the lands conveyed to the Prince by *Brown* with those sought to be recovered from the Appellants; and their Lordships are of opinion, that they have failed to do so. If their Lordships had thought otherwise, and that the suit was to be determined upon proof of this identity, they would have felt it very difficult to refuse to send the cause back for a new trial. For the strength of the Respondents' case is the Register Book;—that Book was first produced in the appellate Court, under circumstances in which the Appellants may have been, in some measure, taken by surprise; and they may, in the documents produced in support of their unsuc-

1867.

GUNGA
GOBIND
MUNDUL

v.

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

1867.

GUNGA
GOBIND
MUNDUL

v.

THE COLLEC-
TOR OF THE
TWENTY-
FOUR PER-
GUNNAHS.

cessful application for review, have the means of meeting the inferences to be drawn from that Book. Objection to reception of those documents here was taken and allowed; and their Lordships have excluded them from their consideration. Upon the whole case, however, and for the reasons already given, their Lordships are satisfied that the suit of the Collector was properly dismissed by the *Zillah* Court; and that this judgment, notwithstanding the fresh evidence produced, ought to have been affirmed by the High Court.

Their Lordships wish it to be understood that this judgment leaves the subject of the liability of these lands to be assessed for *jumma* wholly untouched. All that they decide, is the question of proprietary right, as between the contending private owners.

It may be right to observe that, in their Lordships' opinion, the provision in the Code of Procedure, which requires the Judges who admit fresh evidence on an appeal, to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought at all times to be strictly complied with. It is a salutary provision, which operates as a check against a too easy reception of evidence at a late stage of litigation, and the statement of the reasons may inspire confidence and disarm objection. Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed with costs; and that the decision of the Civil Court, so far as it dismisses the Plaintiffs' suit with costs, be affirmed, and that this appeal be allowed with costs.

MUSSUMAT CHEETHA, and after her
 death, her daughter, MUSSUMAT } *Appellant,*
 JUSSOONDAH; ...

AND

BABOO MIHEEN LALL, and after his
 death, his son, AJODHIA PERSHAD } *Respondent.**

*On appeal from the Sudder Dewanny Adawlut,
 North-Western Provinces, Agra.*

THE Appellant, *Mussumat Cheetha*, the Widow of *Damodur Doss*, was the Plaintiff, and the Respondent, *Baboo Miheen Lall*, son of *Koonj Kishore Doss*, the eldest brother of *Damodur Doss*, the Defendant, in the suit brought in the *Zillah Court* of *Mynpoorie*. The object of the suit was to obtain possession of *Hurheerpore* and ten other villages in the *Etawah* district, with mesne profits for three years, together with interest. The parties to the suit were members of a joint undivided Hindoo family. The villages in question formed part of an

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Romilly, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

who claims a share in such estate to prove that it is a divided family. The entry of the name of one member of a joint family, as *Lumbadar* (the party liable for the assessment of the revenue) on the Registry, being for fiscal purposes, is not *per se* sufficient evidence to establish the exclusive proprietary right of the party whose name is so registered, and the rights of co-partners *inter se* are not affected by such registration.

16th & 17th
 July, 1867.

Where an estate was originally ancestral, belonging to a joint and undivided Hindoo family, the presumption of law being that a family once joint retains that *status*, can only be rebutted by evidence of partition, or acts of separation; and the *onus probandi* lies on the party

1867.

MUSSUMAT
CHEETHA

v.

BABOO
MIHEEN
LALL.

estate which was inherited by three brothers named *Koonj Kishore Doss*, *Damodur Doss*, and *Shama Doss*, in undivided shares. The share of the third brother was subsequently divided off; and the Plaintiff claimed to succeed, in default of male issue, as the Widow of *Damodur Doss*, to eleven of the remaining villages, under an alleged deed of relinquishment, or sale, by which the share of *Koonj Kishore Doss* was alleged to have been transferred to her late husband. On the other hand, the Defendant, who had been in possession for nearly twelve years, denied that any such transfer or sale had taken place, and contended that the shares of his Father and *Damodur Doss* not having been divided, or exclusively vested in the latter, the Plaintiff was precluded by the *Benares* school of Hindoo law prevailing in the North-West Provinces from inheriting.

The facts of the case were as follows :—

It appeared that the *Zemindary* to which the villages in question in the above-mentioned suit, with others, appertained, formerly belonged to *Teek Chund*, a Banker, residing in *Etawah*, and that he was the Father of three sons, named *Koonj Kishore Doss*, *Damodur Doss*, and *Shama Doss*, who succeeded at his death as his heirs. The estate then passed out of the family, and it appeared that two several settlements between the years 1210 *Fusly* (1802–3 A.D.) and 1215 *Fusly* (1807–8 A.D.) were made of the lands of the *Zemindary* with strangers as Farmers. The third settlement of this estate took place in the year 1216 *Fusly* (1808–9 A.D.).

On the 30th of *September*, 1808, *Damodur Doss* presented a petition to the Officer in the District in which the estate was situate, stating that he had

been unjustly deprived of the *Zemindary*, which he described as consisting of 30 *Mouzahs* and 11 *biswas*, in the *Talooqua Fuggra Mow*, &c., in *Zillah Etawah*, by the native Government anterior to the British rule in *India*; and praying that possession in perpetuity might be granted to him of the estate, and that he might pay the Government revenue. It also appeared, that *Koonj Kishore Doss*, previous to the 17th of *May*, 1809, also made an application to the Collector in respect of seven *Mouzahs*, included in *Talooqua Bijaolee*, and forming part of those in the suit, for a separate settlement of them as proprietor, he undertaking to pay the Government revenue for the same. An Order was accordingly made by the Collector, subject to the confirmation of the Governor-General.

Subsequently, *Koonj Kishore Doss* presented another petition respecting the same seven *Mouzahs*, which stated, that as the *Perwannah* of the Court, desiring Petitioner to file an application for the settlement of *Mouzahs Bijaolee*, &c., from 1218 to 1219 *Fusly*, on a *jumma* of Rs. 8,000 per annum, was received by the Petitioner, he begged to represent that *Damodur Doss*, his own Brother, who was the proprietor of this property, and whose name was recorded in the proceeding, would attend in Court, and submit for the Court's consideration his application and *Ka-booleat*, &c., in due form; and the Petitioner prayed that the application of *Damodur Doss* might be granted, and that he might be recognized as the proprietor, to which arrangement Petitioner himself was in every way willing. Upon this petition it was ordered, that an application be received from *Damodur*

1867.
 MUSSUMAT
 CHEETHA
 v.
 BABOO
 MIHEEN
 LALL.

1867.
 MUSSUMAT
 CHEETHA
 v.
 BABOO
 MIHEEN
 LALL.

Doss, with the concurrence and consent of the Petitioner.

On the 2nd of *September*, 1810, *Damodur Doss* made an application for the settlement of *Talooqua Bijaolee* to be concluded with him as *Zemindar*, on a *jumma* of Rs. 16,000 of the currency of 45 from 1818 to 1819 *Fusly*; and the Petitioner agreed to and accepted the *jumma* proposed, clear of all expenses, such as *sayer* and cesses on Travellers, and *abkaree* revenue, excluding all villages and lands held rent free, and those relinquished in charity, as *Bishun Birt* and *Birumpooter*, and other charitable grants, without demur or objection; and stated that the estate consisted of nine villages.

A settlement was accordingly made with *Damodur Doss* for seven villages, which were recorded in his separate name, the other seven villages having been recorded in the name of *Koonj Kishore Doss*.

In consequence of inability to pay the arrears due for Government revenue, the fourth settlement was made with Farmers, excluding *Damodur Doss* as well as *Koonj Kishore Doss*, and the latter ceased from that time to have any further interest in any of the villages in question.

The fifth settlement took place in 1225 *Fusly* (1817-18 A.D.), when *Damodur Doss* succeeded in getting the whole fourteen villages recorded in his own separate name as proprietor (eleven of which were the subject of the present suit). That settlement remained in force up to the settlement subsequently made under *Ben. Reg. IX.* of 1833.

It appeared that the other brother, *Shama Doss*, made an attempt before the Collector to establish his

claim to a joint share in the above villages; but his claim being denied and opposed by both *Damodur Doss* and *Koonj Kishore Doss*, he was left to his remedy by suit.


A settlement was accordingly made with *Damodur Doss* alone, *Koonj Kishore Doss* assenting, and *Shama Doss's* claim put aside; and this settlement was confirmed by the *Sudder* Board of Commissioners.

Orders were then addressed to the *Ryots* and cultivators of the several divisions of the estates in question, in which were comprised the villages, in each of which it was declared by the Government Officer that the *Ryots* were to consider "*Damodur Doss* as the *Zemindar* and accepted rightful *Malguzar* of the above estates, and duly pay the rents to him."

The sixth settlement took place in 1840, when *Damodur Doss*, as proprietor in possession, applied to enter into it in respect of his estate; and previously to its being made, separate public notifications respecting the villages in question were issued by the Government Collector.

By the proceedings of the Settlement Court of *Zillah Etawah*, on the 22nd of *September*, 1840, the former settlements were recited, that on investigation, under *Ben. Reg. IX.* of 1833, into the right and title, &c. &c., of the above estate, it was found that the *Zemindary* right therein belonged to *Damodur Doss*; that he had filed his applications for the new settlement of the villages in question, had executed the *Ikrarnamahs* (agreements containing the terms and conditions on which he held the same, and undertaking to pay the revenue);

1867.


 MUSSUMAT
 CHEETHA

v.

 BABOO
 MIHEEN
 LALL.

1867.
 MUSSUMAT
 CHEETHA
 v.
 BABOO
 MIHEEN
 LALL.

that the notifications aforesaid had been issued; that the term given in them had expired; and that no Objector or party claiming any interest had appeared, and the settlement made with him alone; it being declared in the proceedings that it had been proved that he was sole proprietor and *Malguzar*.

At the time of this settlement *Damodur Doss* caused a statement to be recorded in the *Wagibool-urz*, or administration paper, to the effect, that the name of *Baboo Miheen Lall*, his nephew, the Respondent, should be recorded after his death as proprietor of three *Mouzahs*, viz. *Jugsora*, *Setpoor*, and *Nundunpoor*, he having made them over in gift to him for his support, and specifying the same in the *Ikrarnamah Malguzary* (agreement for payment of revenue); *Damodur Doss* retaining the remaining villages.

On the 21st of *January*, 1841, *Damodur Doss* died, leaving the Appellant, *Mussumat Cheetha*, his Widow, and as such his heir according to Hindoo law, him surviving.

On the 23rd of *March*, 1841, *Baboo Miheen Lall* took steps to get himself recorded as proprietor by presenting a petition to the Collector, wherein he stated the settlement made with *Damodur Doss*; that he was in possession and occupancy of the estates of the deceased, and praying that his name might be recorded in the Government registry as *Zemindar* in place of that of the deceased *Damodur Doss*, and the name of *Damodur Doss* expunged.

After inquiries, the name of *Baboo Miheen Lall* was recorded by the Collector as *Zemindar* of the above villages.

In consequence, a plaint was filed by *Mussumat*

Cheetha, on the 30th of *December*, 1852, in the *Zillah* Court of *Mynpoorie*, and sought to recover possession of the eleven *Mouzahs* before mentioned, and to obtain entry of her name in the Collector's Books, together with mesne profits, against *Baboo Miheen Lall*, since deceased, as principal Defendant, then in possession of the estate, and *Buldeo Pershad* and *Juggernaut*, son of *Shama Doss*, deceased. The facts above mentioned were set forth in the plaint.

The two Defendants, *Baboo Miheen Lall* and *Buldeo Pershad*, put in their answers. In the answer of the former it was, amongst other things, alleged and submitted, that the claim of the Plaintiff was groundless, opposed to the *Shasters* and family usage of both parties, and in contradiction to the Will and agreement of the Plaintiff's husband; and that, with the exception of an allowance for her support, the Plaintiff had no right or title to possession over the *Zemindary* then in the possession of the Defendant. The answer referred to the papers of the Collector's office, the *Ikrarnamah* or agreement of *Damodur Doss*, and the petitions alleged to have been filed by herself as proofs in support of his answer; and *Baboo Miheen Lall* submitted, first, that the Plaintiff having no male issue, according to family usage and the doctrine of the *Shasters*, she had no right or title to succeed to the estate of her husband, which was an undivided and hereditary *Zemindary*, in opposition to or supersession of the Defendant's superior right; secondly, that both the Plaintiff's Husband and the Defendant, *Baboo Miheen Lall*, continued as partners, and proprietors of equal

1867.
 MUSSUMAT
 CHEETHA
 v.
 BABOO
 MIHEEN
 LALL.

1867.

MUSSUMAT
CHEETHA

v.

BABOO
MIHEEN
LALL.

shares in the estate, and that there was a perfect understanding between them, no accounts being ever rendered to either party, or followed by a separation of interests; but that, on the contrary, the Plaintiff's husband, during his lifetime, constituted the Defendant proprietor of his entire possession, and appointed an allowance of Rs. 25 *per mensem* for the Plaintiff's daily expenses and apparel, in case she should decide on living separately, before a meeting of her relatives and the *Gomashtahs* in employ, and the principal residents of the place who might be living at the time; the allowance being independent of expenses required for the ceremonies necessary to be performed for her daughters. That both the Defendant and the Plaintiff were thankful and contented with this arrangement; and the Plaintiff continued to receive the allowance of Rs. 25, fixed by her Husband from the Defendant, from the day of her separation to the month of *Jet*, 1258 *Fusly*, and that allowance the Defendant was willing to allow her.

The answer of Defendant, *Buldeo Pershad*, stated that, according to family usage, the Plaintiff had no right to possession in the hereditary and undivided *Lumberdary* property; that *Baboo Miheen Lall*, the Defendant's elder Brother, was the rightful proprietor, and that he himself had a share in it on partnership with his elder Brother.

The answer of the Defendant, *Juggernaut*, son of *Shama Doss*, disclaimed all interest, and alleged that the villages of his father, belonging to the same hereditary property, had been divided off, and were held separately by him, and since his death by the Defendant.

The evidence of the Plaintiff consisted of the depositions of witnesses, who supported the averments in the plaint as to the exclusive and separate possession of the villages in question by the late *Damodur Doss* under the Revenue settlements; and the witnesses deposed to the effect, that *Damodur Doss* and his Wife lived separate from his Brothers; that *Koonj Kishore Doss*, the Defendant's Father, never held possession since he relinquished his possession of the seven villages and claim to a settlement of these, or the other seven villages aforesaid; and that *Damodur Doss* made no Will or testamentary disposition giving his Widow Rs. 25 *per mensem* as alleged in the answers of Defendants. The evidence of the Defendants consisted of the depositions of witnesses, by which the Defendants endeavoured to establish that the estate in question was ancestral, and had never been divided; that *Damodur Doss's* brother, *Koonj Kishore Doss*, and the Defendants since his death, had continued to have a joint interest in the estate with *Damodur Doss*.

The hearing of the suit took place before the Principal *Sudder Ameen* (*Moulvi Syud Mahomed Vilayut Ali Khan*) on the 28th of July, 1853, when he made a decree in favour of the Plaintiff, finding that the villages in question were the property of the late *Damodur Doss*, and that his Widow and heir rightly succeeded thereto; that the character of ancestral property had ceased to belong to the villages. He also found against the alleged testamentary disposition of *Damodur Doss*, as to the allowance of Rs. 25 *per mensem* to the Widow, not crediting the witnesses of the Defendants.

Baboo Miheen Lall being dissatisfied with this

1867.
 MUSSUMAT
 CHEETHA
 7.
 BABOO
 MIHEEN
 LALL.

1867.
 MUSSUMAT
 CHEETHA
 v.
 BABOO
 MIHEEN
 LALL.

decree, appealed against the same to the *Sudder Dewanny Adawlut* at *Agra*.

Pending the appeal *Baboo Miheen Lall* died, leaving *Ajodhia Pershad*, his son and heir, who revived the suit.

On the 31st of *May*, 1854, the hearing of the appeal took place before Messrs. *Begbie*, *Smith*, and *Dick*, three of the Judges of the *Sudder Dewanny Adawlut*, when a decree was made bearing that date, reversing the decree of the *Zillah* Court, and finding that the estate continued to be joint ancestral estate; and that *Damodur Doss* did not acquire it as sole owner, but that he held possession partly as owner and partly as the representative of his brother, *Koonj Kishore Doss*; that the subsequent record of the name of *Damodur Doss*, and the statements contained in the documents and proceedings drawn up at the settlement under *Ben. Reg. IX.* of 1833, did not alter his possession; that there had been no claim preferred by his nephew, *Baboo Miheen Lall*, or denial on his part, or assertion of an exclusive property which would constitute his tenure of the *Mouzahs* in suit an adverse possession; and dismissed the suit with costs.

Mussumat Cheetha appealed to Her Majesty in Council against this decree. She having died, *Mussumat Jussoondah*, her daughter, the present Appellant, who had a son living, revived and prosecuted the appeal :—

Mr. *Leith*, for the Appellant :—

The weight of evidence establishes the fact, that the estate in question was the sole and separate pro-

perty of the late *Damodur Doss*, and so descended to the Plaintiff, as his Widow and heiress-at-law according to the Hindoo law: *Katama Natchier v. The Rajah of Shivagunga* (a). The principal Defendant was estopped by the proceedings before the Settlement Officer, and by his own acts subsequent to the death of *Damodur Doss*, claiming as his separate and personal heir, from afterwards setting up in defence to this suit that he was joint owner with *Damodur Doss*, and entitled to succeed to the same as joint estate, to the exclusion of the Plaintiff. Even if the decree of the *Sudder Court* was right in declaring the estate joint property, and, therefore, descendible to the Nephew in preference to the Widow of the deceased, yet the same is defective and erroneous in not having at the same time decreed to the Plaintiff, as Widow, a sufficient maintenance out of the estate.

Mr. *Busby*, for the Respondent, was not called on to address their Lordships.

Judgment was delivered by

The Right Hon. Sir JAMES W. COLVILLE.

The Plaintiff, whom the present Appellant represents, commenced her suit in *December*, 1852, to recover possession of certain villages, to which she claimed title as Widow and heiress of one *Damodur Doss*, who died in 1841. The original Respondent, the nephew of *Damodur Doss*, had been in possession of the property for upwards of eleven years before the institution of the suit. These villages being situated

(a) 9 Moore's Ind. App. Cases, 539.

1867.
 MUSSUMAT
 CHEETHA
 v.
 BABOO
 MIHEEN
 LALL.

1867.

MUSSUMAT
CHEETHA

v.

BABOO
MIHEEN
LALL.

in a Province governed by the law of the *Benares* school, it was necessary for the Plaintiff, in order to make out her title to eject the Respondent, to establish that the property claimed was the separate estate of *Damodur Doss*. And it being admitted that this property was originally the ancestral estate, or part of the ancestral estate, of a joint and undivided Hindoo family, she had to make a case sufficient to rebut the well-established presumption of the Hindoo law, that a family once joint retains that *status*, unless it is shown to have become divided; and that the ancestral property of such a family remains joint, unless it is shown, by partition or otherwise, to have become separate.

The family originally consisted of three brothers, *Shama Doss*, *Damodur Doss*, and *Koonj Kishore Doss*. It is admitted on all hands that *Shama Doss* separated himself from his brothers, and took his share of the ancestral estate as separate property. It is, however, clear upon the evidence (and if the fact be not admitted, it is hardly disputed on the part of the Appellant) that the two other brothers continued joint after the separation of *Shama Doss*; and further, that for many purposes *Damodur Doss* and the Respondent (being his nephew, the son of *Koonj Kishore Doss*) were members of a joint family at the time of *Damodur Doss's* death.

In what way, then, did the Plaintiff in the suit seek to relieve herself of the heavy burden of proof which the law in these circumstances casts upon her? She has neither alleged nor proved that a formal partition ever took place between *Damodur Doss* and his brother. Nor has she alleged or proved that any conveyance of his proprietary right was ever executed by the latter

to the former. But she relies on certain settlements of the revenue and other proceedings before the Collectors, the effect of which was, that these villages, which at one time were all recorded in the name of *Koonj Kishore Doss*, at another were recorded partly in his name and partly in that of *Damodur Doss*, came ultimately to be all recorded in the name of *Damodur Doss*, as if he were the sole *Zemindar* thereof, or, at least, the sole *Lumberdar*, or person liable for the due payment of the revenue assessed thereon. And from these proceedings she would have it inferred that *Koonj Kishore Doss* had duly parted with or relinquished his proprietary interest in the villages, and allowed them to become the separate estate of his brother. Mr. *Leith* has candidly admitted that this inference cannot legitimately be drawn from the mere fact that the villages were recorded in the sole name of *Damodur Doss*. He does not dispute the correctness of the proposition laid down by the *Sudder Court*, that, "as the law stands, the mere record of one name does not establish the exclusive proprietary right of the individual so recorded." But he contends, that particular statements and expressions to be found in their proceedings, which he says must be taken to have been made and used with the knowledge and assent of *Koonj Kishore Doss*, or of his son, the Respondent, are sufficient to raise the inference in question, and to make out the title of the Plaintiff.

To this argument their Lordships cannot assent. Both the plaint and the decree of the Principal *Sudder Ameen* refer the alleged relinquishment of proprietary right to the date of the fifth settlement, which took place in 1818, and in the lifetime of *Koonj Kishore Doss*. But it is obvious on the face

1867.
 MUSSUMAT
 CHEETHA
 v.
 BABOO
 MIHEEN
 LALL.

1867.
 MUSSUMAT
 CHEETHA
 v.
 BABOO
 MIHEEN
 LALL.

of the proceedings, that on that occasion the villages were treated as the joint property of the two Brothers, though the settlement was, which the consent and at the request of *Koonj Kishore Doss*, made with *Damodur Doss* alone; whilst, on the other hand, a claim put forward by *Shama Doss* was treated as an adverse claim of proprietorship; for the enforcement of which he was referred to a civil suit. *Koonj Kishore Doss's* petition, which signified his consent, neither relinquished nor disclaimed his interest in the villages; it prayed only that *Damodur Doss's* application to be regarded as Proprietor be granted, the Petitioner being perfectly satisfied with the arrangement. No other or subsequent act imputing a transfer of proprietary right by *Koonj Kishore Doss* is either suggested or proved; and he died before the sixth settlement, which took place in 1840.


If, then, the Appellant's title rests, as it seems to do, upon the alleged transfer or relinquishment of right by *Koonj Kishore Doss* in 1818, statements made and expressions used in the course of the settlement of 1840 are material only in so far as they reflect light upon the true nature of the transaction of 1818.

Nothing can really turn upon expressions in those public documents, to the effect that *Damodur Doss* was sole *Zemindar* and without partners, because whenever property is, for whatever reasons, recorded in the sole name of one of several co-proprietors for fiscal purposes, it must obviously be part of the arrangement to make him who is to pay the Government revenue, and through whose hands the collections from the *Ryots* must, for that purpose, pass, appear to be the sole owner. Yet it is admitted, that

one so recorded may be really what we should term a Trustee for the other members of a joint family, and that the rights of the co-parceners *inter se* may not be affected by the arrangement. The expressions, therefore, in the *Ikrarnamah* importing that on the death of the *Lumberdar*, or person settling for the revenue, his son or next heir, or even an appointee, shall be substituted for him, are all consistent with such an arrangement, the essence of which is that the person in question shall be made ostensibly and on the face of the Revenue records the sole owner of the *Zemindary* rights. Any argument drawn from such expressions seems to their Lordships to be too weak to supply the failure of positive proof of the title set up by the Appellant.

The same answer may be made to the argument which Mr. *Leith* founded on the nature of the Respondent, *Baboo Miheen Lall's*, application to the Revenue authorities to be admitted as heir to his Uncle on the death of the latter. On the face of the Revenue records *Damodur Doss* was the sole registered proprietor. It was, therefore, only as his heir that the Applicant could claim to be substituted as sole *Zemindar* and ostensible owner in his place. A suggestion of joint interest was unnecessary, if, indeed, it would not have been improper, on that occasion. And it is to be observed that, inasmuch as it appeared before the Collector by the *Kanoongoe's* reports that *Damodur Doss* had left a Widow, the claim of his Nephew as heir implied that the property was not the separate estate of the deceased, and that the succession to it was to be governed by the law which regulates the descent of the property of a joint and undivided Hindoo family.

1867.


 MUSSUMAT
 CHEETHA

7.

 BABOO
 MIHEEN
 LALL.

1867.

MUSSUMAT
CHEETHA

v.

BABOO
MIHEEN
LALL.

Their Lordships have hitherto dealt, as the argument before them dealt, exclusively with the documentary evidence. Of the parol evidence it is sufficient to say that each party has produced that which, if believed, would go far to prove his or her case; that the statements of the witnesses for the Plaintiff are, in most respects, in direct conflict with those of the Defendant; and that it is only by its consistency with the documents and the admitted facts of the case that the truth of the testimony on either side can be tested.

One serious difficulty of the Plaintiff was to explain the long possession of the Respondent, *Baboo Miheen Lall*, and her failure to take proceedings for nearly two years after the alleged quarrel between them. The case made on her pleadings, and sworn to by her witnesses, is that he held possession as her Agent, rendering, for a considerable period, accounts to her. But this story is unsupported by the production of any documents or other corroborative proof, and is, in their Lordships' opinion, a most unsatisfactory explanation of the Respondent's possession.

The proofs, therefore, adduced by the Plaintiff below seem to their Lordships insufficient to support the case made by her, and to rebut the strong presumptions of the Hindoo law which she had to meet. But against these proofs their Lordships have to set not only the inferences arising from *Damodur Doss's* petition when about to proceed on a pilgrimage to *Gyah*, the deposition of his *Mookter*, *Sookhe Lall*, in *October*, 1839, and the petitions presented on behalf of the Plaintiff, which are referred to in the judgments, but the almost conclusive evidence contained in the account Books.

That these Books were proved with the strictness which would be required in our Courts cannot be said ; but they seem to have been received according to the course of the Indian Courts. No objection to their reception was made in the first instance ; they were submitted by the Judge to the examination of *Mahajuns* appointed for the purpose, who were questioned by him upon them. Nor does it appear that their genuineness or correctness was ever very formally or directly impugned, though some objection may have been taken to the proof of them.

The course of the argument here induces their Lordships to regret that these material documents were not strictly proved, but they were sent up to the appellate Court as part of the record ; and in these circumstances their Lordships think that, according to the course of these events, the appellate Court was justified in considering them as part of the evidence in the cause ; and that the conclusions which they drew from them were correct. But even if this part of the evidence were withdrawn, their Lordships would be of opinion, that no sufficient ground has been shown for disturbing the judgment of the *Sudder* Court ; and they will humbly recommend to Her Majesty that this appeal be dismissed with costs.

1867.

MUSSUMAT
CHEETHA

v.

BABOO
MIHEEN
LALL.

THAKOORAIN SAHIBA and CHOWDREE }
 JAI CHUND ... } *Appellants,*

AND

MOHUN LALL and others ... *Respondents.**

*On appeal from the Sudder Dewanny Adawlut,
 North-West Provinces, Agra.*

4th March,
 1867.

According to the Benares school of Hindoo Law prevailing in the Mithila country, a Sister's son, in the absence of lineal heirs, has no title to succeed as heir to his deceased Uncle's ancestral estate.

Suit by a sister's son against his Uncle's Widow to set aside an adoption made by the Widow to her deceased husband. Held, reversing the decree of the Sudder Dewanny Adawlut at Agra,

THE suit out of which this appeal arose was instituted by the Respondent, *Mohun Lall*, as one of the expectant or reversionary heirs of *Chowdree Oodai Chund*, deceased, contingent on his surviving the first Appellant, in respect of a quarter undivided share in the *Zemindary* of *Bisswalee*, and to set aside the adoption of the second Appellant by the Widow of *Koor Inderjeet Sing*, hereinafter mentioned.

The question on the appeal was confined to the title of *Mohun Lall* to sue, which ~~right~~ was denied by the Appellants, on the ground that, as *Koor Inderjeet Sing* died childless, and was succeeded by the first Appellant, his Widow, with a power of adoption, which had been exercised by the adoption of the second Appellant, the Respondent, *Mohun Lall*, as a

* Present :—Members of the *Judicial Committee*—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

that, as Sister's son, he had no *locus standi* to sue as reversionary heir for his deceased Uncle's estate, or to challenge the Widow's adoption.

Sister's son, according to the doctrines and rules of the *Benares* school of law prevailing in the *Mithila* country, in which the *Zemindary* of *Bissowlee*, in *Pergunnah, Chupra Mow*, is situate; was excluded from the inheritance, even if the first Appellant were to die. By the decree appealed from the *Sudder Dewanny* Court at *Agra* held that *Mohun Lall*, as a Sister's Son, was as expectant heir entitled to sue; and set aside the adoption on the ground that the authority to the first Appellant to adopt was not established. Hence this appeal.

The facts were as follows :—

The founder of the family was *Chowdree Oodai Chund*, who self-acquired the estate, constituting the *Zemindary*. He died in the year 1816, leaving an only son, *Koor Inderjeet Sing*, who succeeded to the *Zemindary*. He also left him surviving two Widows. His third and eldest Wife died in his lifetime, and had one daughter, also deceased, who was the Mother of the Respondent, *Mohun Lall*. The second Widow, who survived him, was the first Appellant, the Mother of *Koor Inderjeet Sing*. *Koor Inderjeet Sing* Married *Mussumat Maharanee*, and died without issue, leaving his Mother and *Mussumat Maharanee* him surviving, having, as alleged, verbally authorized her to adopt a Son to him, in pursuance of which power she some time afterwards, in the year 1834, adopted the second Appellant. *Mussumat Maharanee* died, leaving the second Appellant a minor, and in consequence the first Appellant managed the affairs of the *Zemindary*.

The present suit was brought in the *Zillah* Court of *Furruckabad*, by the Respondent, *Mohun Lall*, and his brother, *Thakoor Doss*, against the first Appellant

1867.
THAKOORAIN
SAHIBA
?.
MOHUN LALL.

Advocate High Court
Jammu & Kashmir
Srinagar.

1867.
THAKOORAIN
SAHIBA
v.
MOHUN LALL.

and others, claiming, in the absence of male issue, as maternal grandsons of *Chowdree Oodai Chund*, one half of the *Zemindary*, and seeking also to set aside the adoption. The Appellant's answer, among other defences, denied the Plaintiff's right of heirship, and relied upon the validity of the adoption.

The Principal *Sudder Ameen* (*James Mercer*, Esq.), by his decree, dated the 9th of *August*, 1850, found, first, that the adoption had properly taken place ; and secondly, that the claim was barred by limitation of time ; and dismissed the suit.

An appeal from this decree was taken to the *Sudder Court* at *Agra*, which Court affirmed the decree appealed from.

Two other suits were brought by the same parties relating to the same matter, though raising different issues, and various proceedings were had thereon. *Mohun Lall*, who alone carried on the original suit, limited his claim to one-fourth share of the estate, having obtained a review of judgment of the first suit, that suit was remitted back to the *Zillah Court*, and restored to its order on the file. Fresh issues were then recorded, the material one being, first, whether *Mohun Lall* was entitled to inherit as maternal grandson of *Chowdree Oodai Chund*, and had a right to sue ; and secondly, as to the validity of the adoption.

The Principal *Sudder Ameen* sent a case for the opinion of the *Pundit* of the *Sudder Dewanny*, *Adawlut* at *Agra*, as to *Mohun Lall's* right to sue ; to which the *Pundit* (*Ram Nath*), returned the following answer :—

“ After the death of *C.* and his Wife, the entire paternal estate of *C.* reverts to the Mother of *C.*,

that is, to the Widow of *A.*, according to the doctrine of '*Jagbalk.*' After the death of the Widow of *A.*, the estate will descend to the maternal grandsons of *A.*, and transfer of the estate by the female without the consent of the maternal grandsons will be invaild. After the death of the female, the maternal grandsons are entitled to succeed to the property. 2. The Widow of *C.* was competent to adopt a son after the death of her Husband, in his nonage and without issue, provided (according to the doctrine of *Busisht*) she had received her Husband's permission to do so, and the son she had adopted was not the eldest son of his Father. The conditions of adoption are, that Brahmins be fed, and alms be given to the poor."

1867.
THAKOORAIN
SAHIBA
v.
MOHUN LALL.

By the decree of the Principal *Sudder Ameen*, (*Cazee Inayuk Hossein Khan*) on the remit of the suit, in which, as already stated, *Mohun Lall* alone claimed a fourth share of the estate, it was declared that the adoption was invalid, and that *Mohun Lall* had a right as expectant heir to sue. Against this decision an appeal was brought by the Appellants to the *Sudder Dewanny* Court at *Agra*, when it was contended that the Respondent was not the immediate reversioner, and not entitled under the Hindoo law to inherit at all.

The *Sudder Dewanny* Court (consisting of Messrs. *W. Wynyard* and *W. Roberts*) by a decree, dated the 18th of *April*, 1863, affirmed the decision of the *Sudder Ameen*. The material part of the judgment of that Court, as affecting the question at issue, was in these terms:—"In regard to the competence of the Plaintiff to sue, we observe, that the opinion of the Hindoo law-Officer, obtained by the Principal *Sudder Ameen*, is distinctly in favour of the pretensions of the Plaintiff.

1867.

THAKOORAIN
SAHIBA
v.
MOHUN LALL.

No decided case has been quoted to show that this opinion is not consonant with the *Shasters* current in *Benares*. The weighty opinion of Sir *W. Macnaghten*, Vol. II., p. 87, is quoted in opposition to the *Pundit*. The *Pundit* of *Zillah Behar*, in his *Bywusta*, interpreting the text of *Yājnyawalcya*, a Wife, Daughters, both parents, Brothers, their Sons, sprung from the same original stock, distant kindred, &c., stated that in default of heirs down to the Brother's son, the *gotraja* (kinsmen sprung from the same original stock), inherit; on failure of such heir, the distant kindred; and that the Sister's son is ranked among the latter who should succeed after the former. This opinion is conformable to the law as current in *Mithila*, *Benares*, and the other Provinces, as the followers of those schools do not rank the Sister's son among the series of heirs enumerated in the text of *Yājnyawalcya*. We think that this opinion, when fully considered, is not adverse to the pretensions of the Plaintiff. The *Pundit*, whose opinion is approved, does not say that a Sister's son is one of the heirs enumerated; but he says that a sister's son (*vide Shoe Suhai* and others v. *Mussumat Oomed Koonwur*, where Sisters' sons' sons were allowed to inherit under the law of *Mithila* and *Benares* (*Benares Sud. Dew. Ad.*, Vol. VI. p. 301); *vide* remarks at 302) is ranked among the latter (*i.e.* distant kindred, who should succeed after the former). He had previously said, in the note to p. 85, that, according to the law of *Benares*, the Sister's son is not expressly mentioned as heir; but he adds, at all events he can come in only in default of all *Samanodacas*, or lineal descendants as far as the fourteenth in degree. It has not been shown to the

Court that there exists any other Claimant who, being of the *Samanodacas*, or lineal male descendants of the fourteenth degree, or of distant kindred (*Bundoos*) taking priority over Plaintiff, has a prior right of reversion. For the right of a Sister's son to succeed, *vide Morley's Dig.*, Vol. I. p. 326, note. *Raj Koonwarree Kirpa Moyee v. Raja Damodur Chunder*. Decision of Lower Provinces, 20th February, 1845, p. 27. We do not think, therefore, that the Plaintiff is to be regarded in the light of stranger, and as one who has no claim to inherit. We, therefore, affirm the decision of the Principal *Sudder Ameen*, and dismiss the appeal with proportionate costs."

1867.
THAKOORAIN
SAHIBA
v.
MOHUN LALL.

The present appeal was from this decree.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellants.

There is a preliminary objection, which is fatal to the suit. The Respondent, *Mohun Lall*, had no *locus standi*, and was not entitled to sue. He had as a Sister's son no interest, as expectant or reversionary heir, according to the *Benares* school of Hindoo law, to the *Zemindary*; therefore, his suit ought to have been dismissed without calling upon the second Appellant, *Chowdree Jai Chund*, to defend his title to possession as adopted son. The title set up by *Mohun Lall* in his plaint, and under which he now claims one-fourth of the estate, was based solely on the allegation that he was one of the expectant or contingent reversionary heirs of *Chowdree Oodai Chund*, deceased, and as such entitled to succeed next after the death of his Widow, the Appellant, *Thakoorain Sahiba*, whereas the title to the *Zemindary* must be deduced through and immediately from *Koor Inderjeet Sing*,

1867.

THAKOORAIN
SAHIBA

v.

MOHUN LALL.

his son, who died seized of the same as an absolute estate of inheritance, and by whom his Widow, since deceased, first succeeded as heir, and continued in possession till her death, on which event the first Appellant, as Mother of *Koor Inderjeet Sing* and his next heir, would succeed, if the adoption of the other Appellant, *Chowdree Jai Chund*, was set aside. The Widow of a person dying without issue by nature or adoption represents the inheritance similar to a Tenant in tail by the English law. *Katama Natchier v. The Rajah of Shivagunga* (a). The Respondent could not by any possibility succeed as heir, he being a Sister's son, and as such excluded by the doctrines and rules of the *Benares* school, which governs the right of succession in this case. The *Mitacsharâ*, Ch. II. sec. 5, par. 3. *W. H. Macnaghten's* "Hindu Law," Vol. I. pp. 28, 36; Vol. II. p. 85, note. *Strange's* "Hindu Law," Vol. I. Ch. VI. p. 147 [2nd Ed.]. *Eberling* "On Inheritance," pp. 79, 82. *Morley's Dig.*, Vol. I. tit. "Inheritance," p. 326, note. A Sister's son is expressly excluded in the tab'le of succession in *Vivada Chintamani* (Trans. by *Prossonno Coomar Tagore*), the law prevalent in *Mithila*, as held in *Rajchunder Naraen Chowdry v. Goculchund Goh* (b). The Court was misled by the *Bywusta* of the *Pundit*, which being irreconcilable with the Text writers, and opposed to the well-known doctrines of the *Benares* school, it was the duty of the Court to have examined the *Pundit* to explain the grounds of his opinion the discrepancy with those authorities, *Myna Boyee v. Ootaram* (c). Independently of these conclusive authorities, the

(a) 9 Moore's Ind. App. Cases, 539.

(b) 1 Ben. Sud. Dew. Rep. 43.

(c) 8 Moore's Ind. App. Cases, 400.

Sudder Court at *Agra* has lately solemnly overruled their finding in the case now in appeal, in that of *Mussumat Mooneea v. Dhurma* (a). Even if the title to the estate was to be deduced through, and immediately from, *Chowdree Oodai Chund*, yet the Re-

1867.

THAKOORAIN
SAHIBAv.
MOHUN LALL.

(a) MUSSUMAT MOONEEA AND MITHOO ... Appellants ;

AND

DHURMA Respondent.*

MUSSUMAT
MOONEEAv.
DHURMA.

THIS was a regular appeal (No. 20 of 1866) from the decision of *W. S. Pater*, Esq., the Judge of *Agra*, and heard on the 13th of June, 1866, before *F. B. Pearson*, Esq., and *R. Spankie*, Esq., Officiating Judge of the *Sudder Dewanny Adawlut*, North-West Provinces, *Agra*.

It was a claim to establish title to real estate in the town of *Agra*, and to prevent alienation by the Appellants.

The case was thus set forth in the Judge's decision :—

"The Plaintiff states that *Mussumat Mooneea* has illegally adopted *Mithoo* as her husband's heir. Her husband, *Mool Chund*, Uncle of the Plaintiff, died about two years ago. A Hindoo Widow cannot adopt an heir. The income from the property is ample for her during her lifetime.

"The Defendants in reply urge, first, that the Plaintiff, as Nephew, has no title to oppose the adoption ; second, that *Mool Chund* himself acquired the property, and not by inheritance ; third, *Mithoo* is a relative of the deceased *Mool Chund*, and the adoption is legal. *Mithoo* was brought up by him during six years, and shortly before his death *Mool Chund* authorized me to adopt him "

The material issues were—first, was the Plaintiff, as nephew of *Mool Chund*, entitled to oppose the adoption of *Mithoo* ; second, did *Mool Chund* authorize his wife, *Mussumat Mooneea*, to adopt *Mithoo* ? and third, is *Mithoo* a relative of the deceased *Mool Chund*, and is the claim void on that score ?

Upon these issues the following judgment was pronounced :—
"I find, first, that the Plaintiff is Nephew of the deceased *Mool Chund*, and is so entitled to oppose any illegal adoption by *Mus-*

* This case not having been reported in the Court below, and being recognized and confirmed by the judgment of their Lordships in the present appeal, is here inserted.

1867.

THAKOORAIN
SAHIBA
v.
MOHUN LALL.

spondent was not one of the nearest reversionary heirs, expectant on the determination of the estate of his Widow, inasmuch as it appears that he claimed as the Son of a Daughter, and that there were two other Daughters of *Chowdree Oodia Chund* alive, who by

sumat Mooneea ; second, it is not shown that *Mool Chund* authorized *Mussumat Mooneea* to adopt *Mithoo*. Had he done so, *Mithoo* would sooner have been adopted by her. It appears that a misunderstanding had arisen between *Mussumat Mooneea* and the Plaintiff's wife ; and upon that *Mussumat Mooneea* sent for *Mithoo* from a distant village, and then represented him to be the adopted heir of *Mool Chund*, and this occurred only about six months ago, as shown in the evidence on both sides ; third, *Mithoo* is not shown to be related to the deceased *Mool Chund*, but only one of the brotherhood, or connection. I decree in favour of the Plaintiff, with costs."

On the appeal to the *Sudder Court* it was contended, amongst other objections, by the Respondent, that the Plaintiff, being *Mool Chund's* sister's son, could not inherit his property, and, therefore, the suit should have been dismissed as barred by the Hindoo Law.

The *Sudder Court's* judgment was in these terms :—" We think it unnecessary to refer to the other pleas, and confine ourselves to the objection in bar of the suit. We are of opinion that the objection is fatal to the suit. We are aware that there is a ruling of this Court in the case of *Sahiba Thakoorain and Chowdree Jai Chund v. Mohun Lall*, dated 18th of April, 1863, which declares that a sister's son may inherit his maternal uncle's property, but this decision only accepts him as an heir in the absence of any lineal male descendant of the fourteenth degree, or distant kindred. We, however, observe that the weight of precedent and opinion is against this ruling. *Macnaghten*, Vol. II., p. 87, does not admit of such a claim ; nor does *Strange*, Vol I., p. 147. We do not find a Sister's son in the table of succession in the *Mitacsharâ*. The Sister's son appears to be regarded as sprung from and belonging to a different family. In the *Madras Presidency* he would not inherit. *Madras Sud. Ad. Dew.* 1859, p. 249, quoted in p. 14, Appx. translation of Law of Inheritance according to the *Mitacsharâ*, and the *Mitacsharâ* has paramount authority in that part of the Country. We are further confirmed in our opinion on this case by a decision of the High Court, dated the 6th of September, 1864, (*Morgan and Shumboonath Pundit*, Judges), which rules that a

the Hindoo law were his nearer and immediate heirs. Again, the Court below was wrong in casting the *onus* on the Appellants of proving that there was no nearer heir than the Respondent, and treating him as in the class of Hindoo heirs called *Bundoos*, or distant kindred, although he never could be heir. The *onus* of proving himself, which he failed to do, the immediate and nearest heir in expectancy of *Koor Inderjeet Sing* properly lay on him as Plaintiff, seeking to dispossess the Appellant, *Jai Chund Chowdree*, and to set aside his adoption.

1867.
THAKOORAIN
SAHIBA
v.
MOHUN LALL.

Mr. *Piffard*, for the Respondent :—

The objection now taken to the Respondent's right to sue is untenable. It is not for the Respondent to show that there were no intermediates entitled before him. As maternal grandson of *Oodai Chund*, he is entitled to the reversion of his self-acquired estate, after the deaths of *Inderjeet Maharanee* and *Thakoorain Sahiba*; *Koor Inderjeet Sing* having died without issue. By the Hindoo law, after the Brother's sons, the Sister's son succeeds. *Vyavahāra-Mayūkha*, Ch. IV. sec. 16 (Trans. by *Borrodaile*), referred to in *Venayeck Anundrow v. Luxumeebaee* (a), and adopted in that case. It is admitted that a Sister's son cannot claim as one of the *Bundhoo*, or distant kindred, who are especially enumerated in the *Mitacsharā*, Ch. II. sec. 6, and of whom the nearest is the Father's Sister's son. It is admitted, also, that there is no authority for placing the sister's son as no heir where the *Mitacsharā* (the authority in *Benares*) prevails. We, therefore, consider the Plaintiff has no *locus standi* in Court, and that his suit should have been dismissed on that account. With this view of the case, we decree the appeal and reverse the decision of the Lower Court, with costs."

(a) 9 Moore's Ind. App. Cases, pp. 516-524.

1867.

THAKOORAIN
SAHIBA

v.

MOHUN LALL.

Sister's son, as the Court below did, next after the *Samanodacas*. The text of the *Mitacshará* explicitly declares that after the *Samanodacas* shall come the *Bundhoos*. Now, the Sister's son cannot be interpolated between these two classes, to neither of which he belongs. The true place of the Sister's son is with *gotraja*, or kinsmen who are also *Sapindas*, or connected with the deceased by funeral oblations ; that is, that the relationship to the deceased is so near, that they are entitled, in the absence of still nearer relations, to conduct the funeral rites, and present the funeral cake. This is placed by some Text writers at the fifth, by others at the seventh, degree. Persons more remotely connected, although in the absence of any nearer relative they may conduct the funeral rites, are not, according to the Hindoo law, permitted to offer the funeral cake, but the libation of water only. *Mitacshará*, Ch. II. sec. 5, par. 6. The authority of *Macnaghten* and *Strange*, relied on by the Appellant, are really not independent authorities, but are based upon and refer to the *dictum* laid down in the case of *Rajchunder Naraen Chowdry v. Goculchund Goh* (a), in which it is taken for granted that the Sister's son, not being expressly mentioned in the *Mitacshará*, is excluded from inheritance. This is extrajudicial, as it was expressed on a point on which the Court was not called upon to decide, and is, therefore, not entitled to any weight. It is true that an opinion has prevailed among English Text writers that the law of *Benares*, which is subject to the *Mitacshará*, differs from the law of *Bengal* on the right of inheritance of a Sister's son, but that opinion is founded upon a misconception of

(a) 1 Ben. Sud. Dew. Rep., 46 ; See also *W. H. Macnaghten's 'Hindu Law,'* Vol. II., Case 6, p. 125.

1867.

THAKOORAIN
SAHIBA
v.
MOHUN LALL.

the effect of what is laid down in the third, fourth, and fifth pars. of the 2nd Chapter of the *Mitacshará*, and by not appreciating the true effect and meaning of the words "*Gotraja*," "*Samanodaca*," and "*Bundhoo*." If the contention of the Appellant be correct, the *Mitacshará* presents the anomaly of totally excluding the Sister's sons from inheritance, while it admits the sons of both the Father's Sister and the Grandfather's Sister ; and this without a single passage in the Text enjoining such exclusion. But this anomaly disappears if the wording of the *Mitacshará* is carefully considered. "*Gotraja*" means a kinsman, and includes all near relatives, both agnates and cognates. "*Bundhoo*" means a distant kinsman, and by itself would include all distant kinsmen, both agnates and cognates. "*Samanodaca*" means a relative bearing the same surname or family name ; according to Hindoo law, as interpreted by *Yájnyawalcya*, or rather in the Commentary on his Institutes by *Vignyanés-wara*, called "The *Mitacshará*." The relatives of the deceased who are not further removed from him than the fifth degree may, whether agnates or cognates, offer the funeral cake, and are called *Sapindas*. Of them an instance is a Daughter's sons ; they are undoubted *Sapindas*, although they are not *Samanodacas*, inasmuch as they bear the surname of their Father, and never of their maternal Grandfather. The rule is inflexible, that no Hindoo can marry into a family bearing the same family surname, however remote the connection. Should there be no *Sapindas*, the only person who can perform the funeral rites, with any advantage to the soul of the deceased, are his *Samanodacas*, or kinsmen bearing the same family name, and these, when not *Sapin-*

1867.

THAKOORAIN
SAHIBA
v.
MOHUN LALL.

das, can make no oblation but the common libation of water. Thus we have three classes—first, the *Sapindas*, who may be *Samanodacas* or not, but must be near kinsmen, and their oblations afford most benefit to the deceased; second, the *Samanodacas*, who, though distant, can afford some benefit; and third, the *Bundhoo*, distant kinsmen, who, though connected by blood, can afford no spiritual benefit. These being their respective positions, the Hindoo law, while giving a preference to those who are related, nevertheless places before all others those qualified to be *Sapindas*; then those who are *Samanodacas*; and not till it has exhausted all who can confer spiritual benefit on the deceased, does it allow the *Bundhoo*, or near kinsmen, to inherit. The reason, therefore, for the list of kinsmen who are to inherit after *Samanodacas* commencing with the sons of the Father's Sister, according to the true interpretation of the passage in the *Mitacshará*, Ch. II. sec. 6, par. 1, is obviously this, that the next nearer degree, namely, the Sister's son, is a *Sapinda*, and as such comes in before, and not after, the *Samanodaca*. This is confirmed, first, by the fact that *Neelkunto Bhutto*, in the *Mayúkhá*, Ch. IV. sec. 19, distinctly asserts the Sister to be a *Sapinda*, and that her Son would be within the fourth degree inclusive, and so also a *Sapinda*. Secondly, that both *Balam-bhuatta* and *Nanda Pandita* include the Sister's sons as *Sapinda*, and hold them entitled to inherit next after Brother's sons; and thirdly, that in the *Mitacshará* itself, Ch. II. sec. 5, par. 4, the paternal grandmother, an undoubted *Sapinda*, is directed to inherit only on failure of the Father's descendants; among whom a Sister's son must be necessarily included.

Sir R. Palmer, in reply :—

It is admitted that the words in the *Mitacshará* are "Brothers and Brothers' sons," but the Respondent's Counsel endeavours, by some equitable construction, to avoid this plain meaning, and to say, "Sisters and Sisters' sons" ought to be included, and he relies upon a passage in the *Vyavahára-Mayúkha*, Chap. IV. sec. 16 (Trans. by *Borradaile*), which lays it down that, in default of the Wife, the Daughters succeed. That is an authority only in force in *Bombay*, but is not received in the *Mithila* country; but he entirely ignores the fact, that there are two Sisters of their deceased Brother now living, who, even according to that authority, would succeed in preference to the Respondent. It was so decided by this Tribunal in *Venayeck Anundrow v. Luxumeebaee* (a), and in the case of *Ichharam Shumbhudas v. Purmamund Bhaeechund* (b), *Morley's Dig.* tit. "Inheritance," p. 326, and note (2), *ib. W. H. Macnaghten*, Vol. I. p. 35, comments upon this case, and says it is a doctrine peculiar to *Bombay*, therefore, being a Sister's son, he had, even by that law, no *locus standi*, as the deceased's Sisters were their Brother's heirs. There can be no question that the law to govern the succession to this *Zemindary*, is the law current in *Benares*, by which law, in default of the Son, the Son's son, and grandson, the Widow, supposing the husband's estate is separate, as in this case, succeeds. *W. H. Macnaghten's "Hindu Law,"* p. 32. The decree cannot be upheld, as the Court has by its latter decision, in *Mussumat Mooneea v. Dhurma* (c), expressly overruled their judgment in this case, and

(a) 9 Moore's Ind. App. Cases, 516; and see note, *ib.*, 528.

(b) 2 Borr. Bom. Rep., 471.

(c) *Ante*, p. 393.

1867.

THAKOORAIN
SAHIBA
7.
MOHUN LALL.

1867.

THAKOORAIN
SAHIBA

7.

MOHUN LALL.

the latter ruling is in accordance with the *Vivada Chintamani*, voce "Table of Succession."

Judgment was pronounced by

The Right Hon. Sir JAMES W. COLVILE.

Their Lordships have authorized me to state that in their opinion the preliminary objection which has been taken to the maintenance of this suit must prevail. It unquestionably lay upon the Plaintiff, *Mohun Lall*, one of the Respondents, to show that he had a right to sue. The suit is of a peculiar nature, because it is one brought by a person who, even if his own case were true, might probably never have an interest in the property, inasmuch as he can have only a contingent estate during the lifetime of the Appellant, *Thakoorain Sahiba*. Such a suit is permitted simply on the ground of the necessity that the contingent reversioner may be under of protecting his contingent interest. It is, therefore, essential to see that he has such an estate as entitles him to come in in that way,—in other words, that he holds the character which he professes to hold.

Now, the admissions which have been properly had candidly made at the Bar, have reduced the question to a very narrow compass. As the suit was originally launched, and upon the face of the plaint, there was some uncertainty as to the mode in which the parties sought to establish their title. There was apparently some confusion in the mind of the Pleader whether *Koor Inderjeet Sing* or his father was what we call the *propositus*, and whether it was not sufficient to deduce a title to inherit from the father. Before the case reached the *Sudder* Court that confusion had been dispelled, and the Judges of that Court (as

appears by their judgment) considered the case on the assumption that *Koor Inderjeet Sing* was, as he no doubt was, the *propositus*, and that the Respondent, *Mohun Lall*, had to show that he was in the line of heirs to him.

1867.
THAKOORAIN
SAHIBA
v.
MOHUN LALL.

The admission, however, which Mr. *Piffard* made at the Bar to day, implies that the learned Judges of that Court decided in favour of that Respondent upon a ground which is no longer tenable. They treated him as having an interest, on the ground that, being a Sister's son, he comes within the category of the cognates or *Bandhoos*. That view is now abandoned, and, therefore, the question is narrowed to that raised by the very ingenious argument of Mr. *Piffard*, namely, whether, upon the true construction of the *Mitacshará*, the Sister's son does not come in as one of the earlier class of heirs known as *Sapindas*?

We think that if this question were *res integra*, and to be determined on a construction of the *Mitacshará* alone, there would be considerable difficulty in coming to the conclusion to which Mr. *Piffard* would bring us. There is, no doubt, some foundation for the ingenious arguments which he has addressed to us. It is, perhaps, a startling anomaly, that whilst among the cognates the Aunt's sons are included, the Sister's sons should be altogether excluded from the inheritance; and there is also something plausible in the argument which he has founded upon the fourth article of the fifth section, which says that "on failure of the Father's descendants the heirs are successively the paternal Grandmother, the paternal Grandfather, the uncles and their sons." The difficulty, however, that occurs on the words "on failure of the Father's descendants" is really not insuperable, because they may well be taken to import the failure of the Father's

1867.

THAKOORAIN
SAHIBA7.
MOHUN LALL.

descendants, who, according to the rules expressed in that Treatise, are capable of inheriting. Indeed, unless so qualified, they would give by implication a right to inherit not only to Sisters' sons, but to Sisters who, *ex concessis*, are excluded from the inheritance.

Mr. *Piffard's* argument had, in truth, a sort of double aspect. At first he dwelt a good deal upon the authority of the author of the Treatise called the *Vyavahāra-Mayúcha*; but afterwards he fell back upon the authority of *Balambhatta* and *Nanda Pandita*. The two authorities are not consistent. We may at once dismiss that of the *Vyavahāra Mayúcha* by saying that that Treatise, though received in the *Bambay* Presidency, appears to be of no authority in the Districts the law of which has now to be applied. It is further to be observed that, if received, it would not support the contention of Mr. *Piffard*, because it gives the right of heirship to the Sister herself, and not merely to the Sister's son, and puts the Sister after the paternal Grandmother and between the paternal Grandmother and the paternal Grandfather.

The other argument, that on which Mr. *Piffard* finally rested his case, is shortly this. The seventh article of the fourth section of the second chapter of the *Mitacshará* says:—"On failure of Brothers also, their Sons share the heritage in the order of the respective Fathers." Two ancient Commentators, *Balambhatta* and *Nanda Pandita*, held that the words "their sons share the heritage" are to be construed so as to include the Daughters as well as the sons of Brothers and the Sons and Daughters of sisters; and Mr. *Piffard* would have us adopt this construction. But the paragraph clearly implies that the parent, if in existence, is to take the succession. And accordingly the two Hindoo Commentators (see the

note on paragraph 7, sec. 4), would include Sisters in the term "Brothers," and give them a place in the line of succession. But Mr. *Piffard* is constrained to admit that Sisters are excluded. In fact, it would not suit his Client's case to admit them.

On the other hand, if "Brothers" are to be taken simply as "Brothers," and "their Sons" as Brother's sons, the text of the *Mitacshará* is perfectly clear; and the first clause of the fifth section shows that on the failure of Brother's sons, Gentiles share the estate, the paternal Grandmother being the first person of that class of heirs who take the estate. Again were the arguments in favour of the construction which Mr. *Piffard* would put upon the *Mitacshará* far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction of the words of that Treatise, to run counter to that which appears to them to be the current of modern authority. To alter the law of succession as established by a uniform course of decisions, or even by the *dicta* of received Treatises, by some novel interpretations of the vague and often conflicting texts of the Hindoo Commentators, would be most dangerous, inasmuch as it would unsettle existing titles.

Of what may be called the modern authorities, we have, first, the decision of the *Sudder Dewanny Adawlut* at Calcutta in 1801. *Rajchunder Naraen Chowdry v. Goculchund Goh* (1 Ben. Sud. Dew. Adw. Rep. 43). It is impossible to read that case without seeing that the point was clearly raised before the Court, which at that time consisted of Judges who were considerable authorities on Hindoo law. That decision has received the high sanction of Sir *William Macnaghten*, "Hindu Law," Vol. I. p. 28;

1867.

THAKOORAIN
SAHIBA
v.
MOHUN LALL.

1867.
 THAKOORAIN
 SAHIBA
 v.
 MOHUN LALL.

it is also cited by Sir *Thomas Strange*, "Hindu Law," Vol. I. p. 147, and it has ever since been considered to be a correct exposition of the law. Nor can it be said, as was suggested by Mr. *Piffard*, that all the subsequent authorities rest upon this decision, which he attributed in part to the inability of English Judges fully to appreciate and apply the terms of the Hindoo Treatises. For at page 84 of the second volume of *Macnaghten's Principles and Precedents of "Hindu Law,"* we have the *Bywusta*, or opinion of the *Pundit* of the *Dacca* Court of appeal purporting to interpret the text of *Yājñyavalkya*, and making no reference whatever to this decision of the *Sudder* Court. He there puts Sisters' sons out of the category in which Mr. *Piffard* would include them; although, erroneously perhaps, he puts them among the *Bandhoos*, or distant kindred. Again, from the MS. case cited at the Bar (*ante*, p. 393), we find that the *Agra* Court, overruling its decision in this case, has recently held that the Sister's son is not in the line of heirs at all; that the same point has been decided at *Madras*, and was recently decided in the High Court of *Bengal*. It had previously been decided in the case which is set forth in the record. Against all these concurrent authorities we have nothing to set but the decision now under review, which it is admitted at the Bar cannot rest upon the ground on which the Judges put it.

Their Lordships are, therefore, of opinion that they must humbly recommend Her Majesty to reverse the decrees under appeal, and to declare that the suit ought to have been and be dismissed with costs. The Respondent, *Mohun Lall*, must also pay the costs of this appeal.

GREEDHAREE DOSS

...

... Appellant,

AND

NUNDOKISSORE DOSS, MOHUNT

... Respondent.*

*On appeal from the High Court of Judicature at
Fort William, in Bengal.*

THE question in this appeal related to the claim of the Appellant to succeed to the office of *Mohunt*, the Superior of the *Akra* of an endowed religious monastic institution of professed ascetics, situate at *Rajgunge* in the District of *Burdwan*, and other

17th & 19th
July, 1867.

G. D., the reigning *Mohunt* of the *Mutt* or *Akra* (a religious endowed institution in *Burdwan*), made a Will, appointing L., one of his Disciples, to succeed him as *Mohunt*,

° Present:—Members of the *Judicial Committee*—The Right Hon. Lord Romilly, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor:—The Right Hon. Sir Lawrence Peel.

and to take possession of the real and personal estate belonging to the *Akra*, with a reservation that, when L. should find himself incapable of fulfilling the duties of the office he should appoint one G., who was specially designated by him, in L.'s place as *Mohunt*.

L. was installed as *Mohunt*, and took possession of the *Guddee* (or Throne) and estates attached to the *Akra*; and was subsequently recognized and confirmed as Superior by the Assembly of *Mohunts*. L., by his Will, nominated N., his successor to the *Mohuntship*. In a suit by G. against N. for a declaration of G.'s reversionary right to the *Mohuntship* under the Will of G. D., held:—

First, that according to the true construction of the Will of G. D., there was no absolute gift to G. of the reversion upon L.'s death, or incapacity to perform the duties of the office.

Secondly, that even in the event of L.'s becoming incapable to perform the duties of *Mohunt*, the direction of the Testator, or Grantor, amounted at most to a precatory trust, and was not imperative upon L.

Whether by usage there was any power in the *Mohunt* to impose such a restriction on his successor, to nominate a specified individual, *Quære*?

Held, further, that from the frame of the suit the Plaintiff could only succeed by force of his own title, and not by the infirmity or illegality of the Defendant's title.

GREEDHARKE
DOSS
v.
NUNDOKIS-
SORE DOSS,
MOHUNT.

similar *Akras*, and to the real and personal property belonging to that foundation.

The Appellant founded his title to the *Mohuntship* and estates as hereditary heir of one *Gopaul Doss*, a former *Mohunt*, his spiritual father or guide, as his *Shishya* or favourite *Chella* (Disciple or pupil), under a verbal appointment to that office by *Gopaul Doss*, confirmed by the Will of *Gopaul Doss*, hereinafter mentioned, and his alleged double *Ticca* or investiture with *Ladlee Doss*, who succeeded *Gopaul Doss* as *Mohunt*, by the assembled *Mohunts*, in conformity with *Gopaul Doss's* nomination. The Respondent, who was in possession and acting as *Mohunt*, on the other hand set up his right to the *Mohuntship* through *Ladlee Doss*, the late *Mohunt*, under an appointment and Will by him made in his favour,* which appointment was confirmed by his election and investiture by the assembly of *Mohunts* of the above-mentioned religious establishment; and he denied the alleged double *Ticca*, or the Appellant's title as reversioner under *Gopaul Doss's* Will.

In the month of *May*, 1857, *Gopaul Doss*, the then *Mohunt*, being in ill-health, and shortly before his death, made his Will, which was addressed:—
“To the most blessed *Ladlee Doss*.” After referring to his state of health and the nature of his office, the Will contained the following passage:—“There is no one among my *Chellas* (Disciples) so fit, wise, virtuous, and loving towards religious men, that I can entrust him with the performance of these duties so as to protect the immovable and movable properties and perform the religious ceremonies after my death, consequently, I think it expedient and necessary to make arrangement during my own life, whereby the said wor-

ship and the entertainments of the guests, &c., will continue as they now do, and whereby the properties annexed thereto may be properly managed. As you are my *Gooroo* brother, and specially since the time of my late *Gooroomohassy* and my election to the *Guddee*, you, by your ability, wisdom, and virtue, and good conduct, have satisfactorily fulfilled the several duties relating to the *Akras* in your capacity as *Adhicarry* (head) of the *Akras*, and you have authority over everything. I have, therefore, a firm conviction that if you are appointed *Mohunt* in my place, the properties belonging to those several *Akras* will be properly managed, and the religious rites which are performed there will have perfect justice in your hand. Therefore, of my own free will, and in a sound state of mind, without any compulsion and coercion, I execute this my last Will, whereby I make the following promise and arrangement:—If the present sickness prove, which God forbid, fatal to me, you will succeed me in my absence in the *Guddee* as the next *Mohunt*, and have your own name entered as proprietor in the records of all those properties in substitution of mine, and take charge of all the properties both real and personal belonging to the said *Akras*, and keep in safe custody the gold and silver ornaments, and plates, and brass utensils belonging to the idols at those *Akras*, and receive the outstandings due to the *Akras*, and pay the debts due by them, and thus representing me every way, you will perform the religious duties in the usual way. Of my *Chelas Sreejoot Greedharee Doss* is a little intelligent, but he is of immature age. If he studies the *Dharma Shastra*, religious Books, for a short time he may become a fit person, therefore you shall keep

1867.
 GREEDHAREE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

1867.
 GREEDHAREE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

him under you, and instruct him in the *Dharma Shashtra*, and other Books studied by *Mohunts*. When you will find yourself incapable of fulfilling the duties aforesaid, you will appoint the said *Greedharee* in your place as *Mohunt*. You shall not be able to act otherwise. To this purport I make my Will, and after my death any demand or objection by any person against it will not be admissible; but if by the grace of God I recover from illness, then this Will shall cease to take effect, and I shall continue *Mohunt* as I used to do. To this effect I execute my last Will, dated 6th *Joistee*, 1264."

Gopaul Doss died on the 31st of the month of *Jeyt*, 1264 (corresponding with *June*, 1857), and *Ladlee Doss* ascended the *Guddee*, or seat of honour, and took charge of the *Akras* left by his predecessor, and entered into possession of all the property real and personal belonging thereto. He also obtained the customary election or recognition and confirmation by an assembly of *Mohunts* of his nomination by the Will of *Gopaul Doss*; he also obtained from the Civil Judge of the *Zillah* of *East Burdwan* the usual certificate of administration, under Act, No. XX. of 1841.

On the 22nd of *September*, 1859, the Appellant, *Greedharee Doss*, filed his plaint against *Ladlee Doss*, in the Civil Court of the Principal *Sudder Ameen* of *East Burdwan*, claiming the cancellation of the certificate of administration and of the Will itself, and the possession of the property appertaining to the *Mohuntship* and of the office of *Mohunt*, as successor, alleging, among other things, that the above Will of *Gopaul Doss*, set up by *Ladlee Doss*, was spurious.

The nature of the suit and the proceedings which

were taken in it sufficiently appears from the decision pronounced by Mr. *Buckland*, the Judge of *East Burdwan*, on the 6th of *August*, 1860, of which the following were the material passages :—

“The Plaintiff sues to obtain investiture and possession as *Mohunt* of the *Mutt* or *Akra* of *Rajgunge*, in the town of *Burdwan*, with its subordinate *Mutts* and movable and immovable property and rights and privileges belonging to it, the claim being valued at Rs. 17,77,631. 0 a. 1 p. The Plaintiff's case is, that he is the chief *Chella* or Disciple of the late *Mohunt*, *Gopaul Doss*, and that *Gopaul Doss* shortly before his decease nominated him as his successor in the *Mohuntship*; but as the Plaintiff was then a minor, the Defendant, *Ladlee Doss*, was verbally appointed by *Gopaul Doss* as temporary Manager of the *Mohuntship* until the Plaintiff should become duly qualified to take the office. The case for the Defendant is, that the late *Gopaul Doss* made a Will, by which he nominated the Defendant as his successor in the *Mohuntship* until he should become incapable of performing the duties, when the succession would devolve on the Plaintiff. Eventually the following single issue was fixed for argument, namely : ‘Admitting the Will set forth by the Defendant to be genuine, whether the late *Mohunt*, *Gopaul Doss*, had power under the Hindoo law to make the disposition of the *Mohuntship* in the Will?’” The Judge then stated the most material portion of the Will (*ante*, p. 406), and proceeded as follows :—“The above is an accurate translation of the terms, but not of the mere details of the Will, which is admitted by the Plaintiff's Counsel to be genuine, a fact of which it may be observed that the strongest possible evidence has been

1867.
GREEDHAREE
DOSS
v.
NUNDOKIS-
SORE DOSS,
MOHUNT.

1867.

GREEDHAREE
DOSS

v.

NUNDOKIS-
SORE DOSS,
MOHUNT.

given by the Defendant, whilst the Plaintiff's averments are supported only by the most palpable perjury. The Counsel for the Defendant having, however, waived the advantage arising to him from the failure of the Plaintiffs' case, it remains to dispose of the legal question which was proposed for argument, namely, whether the late *Mohunt* had power under the Hindoo law to make the disposition of the *Mohuntship* which is found in the Will." The Judge then, after referring to the following authorities and decisions on Hindoo law,—*Daya Krama Sangraha*, pp. 28, 30, 36; the *Dayá-Bhaga*, Ch. XI. sec. 6, par. 35; the *Vyavastha Durpuna* of *Shamachurn Sircar*, pp. 297-9; *Govind Doss v. Ramsahoy Femadar* (a); *W. H. Macnaghten's "Hindu Law,"* Vol. II. p. 101; *Gunes Gir v. Amrao Gir* (b); *Ramrutun Dass v. Bunmalee Das* (c); *Surubanund Purbut v. Deo Sing Purbut* (d); *Narain Das v. Bindrabun Das* (e), proceeded as follows: "In pronouncing a decision on the legal question before the Court, it may be observed, in the first place, that the sole original text of *Yajñyavalkya* which is discoverable as an authority on the point, refers clearly to a state of things when ascetics had no such possession as landed estate and gold and silver vessels to bequeath to their successors, but merely a hoard of mild rice, a gourd, a clant, or perhaps a few Books and clothes; but it is equally evident that this text has been always considered as a leading authority in directing the right of succession to a *Chella* or pupil in preference to other parties, and to the *Khas Chella*, or principal Disciple of the

(a) Fulton's Rep., 217.

(b) 1 Ben. Sud. Dew. Rep., 218.

(c) 1 Ben. Sud. Dew. Rep., 170.

(d) 1 Ben. Sud. Dew. Rep., 296.

(e) 2 Ben. Sud. Dew. Rep., 151.

deceased, in preference to ordinary *Chellas*. If, therefore, the Plaintiff, *Greedharee Doss*, had been of age and duly qualified to undertake the duties of a *Mohunt* at the time of *Gopaul Doss's* death, then there is no doubt that *Gopaul Doss* would have selected him as his successor, and had him elected to the *Guddee* by the assembled *Mohunts*. The terms of *Gopaul Doss's* Will, in which he turns from *Ladlee Doss* to nominate *Greedharee Doss* as his successor, fully justify this conclusion. There is no precedent in the decisions of the *Sudder Court* exactly parallel to the present case, but it is evident from the tenor of the decisions, which are to be found under the head of '*Mohunt*,' that two points have always been regarded in determining the rightful succession to a *Mohuntship*—first, nomination by the last incumbent; and second, acknowledgment and confirmation of this nomination by an Assembly of *Mohunts*. With regard to the power of nomination, it may be said that as the right of nomination is undeniable, it seems useless to dispute whether such nomination can only be verbal, or whether it may be committed to writing. The present case furnishes an illustration of the necessity of taking the most stringent precaution to obtain written contemporaneous record of the nomination. Was it, then, legally in the power of *Gopaul Doss* to nominate a spiritual brother, *Ladlee Doss*, as his successor in the absence of a duly qualified *Chella*? This question must be answered in the affirmative. It was argued by the Counsel for the Plaintiff that *Ladlee Doss* had never been duly qualified as Disciple to be capable of being elected a *Mohunt*; but this argument is not based on any evidence, and is contrary to the written statement of *Gopaul Doss*, that he had

1867.
 GREEDHAREE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

1867.
 GREEDHAREE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

been his fellow-disciple under the previous *Mohunt*, *Poovooshutton Doss*, and it is contradicted by the mere fact of his election by the other *Mohunts*, who would never have consented to the appointment of a person not duly initiated under the ruling in the case 2 at page 10 of Vol. II. of *Macnagthen's* 'Hindu Law'; it is declared, that a fellow-disciple or spiritual brother can succeed, and this ruling appears to be specially applicable to the present case, where there was no heir, that is, *Chella*, immediately available, and where *Ladlee Doss*, as the spiritual brother of the deceased, attended him on the point of death, and performed his exequial rites. If, therefore, it was legally open to *Gopaul Doss* to nominate *Ladlee Doss* as his successor, it is much more clear that by the usages of the particular *Mohunttee* of *Rajgunge*, *Gopaul Doss* considered himself authorized to make the nomination, and it was deemed by the assembled *Mohunts* that *Ladlee Doss* should have been nominated. It appears that one *Poovooshutton Doss* was *Mohunt* of *Rajgunge*, but this *Poovooshutton Doss* becoming at one time wearied of the *Mohuntship*, nominated one *Sookram Doss* as his successor, and on this nomination *Sookram* was elected *Mohunt* in the lifetime of *Poovooshutton Doss*. But *Sookram* died, and *Poovooshutton* again came forward and resumed the *Mohuntship*. He was opposed by one *Gour Doss*, as a *Chella* of *Sookram Doss*, but on a reference to the Civil Court of this district, *Poovooshutton* was maintained as *Mohunt*, and this order was upheld by the *Sudder Court*. It is, therefore, evident that in this particular *Mohunttee*, the succession of a *Chella* has not been invariably observed, and, therefore, so far as usage is concerned, there was nothing irregular in the

nomination of *Ladlee Doss* as the successor of *Gopaul Doss*, or in his election by the assembled *Mohunt*—a fact which is clearly established in evidence. The decision of this Court, therefore, is that, under the Hindoo law, the late *Mohunt* had power to make the disposition of the *Mohuntship* which is found in the Will, and the suit of the Plaintiff is, therefore, dismissed, with costs."

From this decision the Appellant appealed to the *Sudder Dewanny Adawlut*, which appeal was dismissed with costs on the 22nd of June, 1863, at the instance of the Appellant himself.

On the 21st *Kartick*, 1267, B.S. (corresponding with November, 1860), *Ladlee Doss*, the then *Mohunt*, being in ill-health, made his Will, nominating the Respondent, *Nundokissore Doss*, to be *Mohunt*, at his decease. This instrument stated, that *Gopaul Doss* had expressed a wish that he should elect the Appellant, *Mohunt*, on becoming himself incapacitated from performing the duties of the office, but alleged that, from the incapacity and bad conduct of the Appellant, he was unfit for the office of *Mohunt*, which he accordingly conferred on the Respondent.

Ladlee Doss died shortly afterwards, and the Respondent presented a petition to the Civil Judge of *East Burdwan* for the grant to him of a certificate of administration, under Act, No. XXVII. of 1860, which had been substituted for Act, No. XX. of 1841. In this petition the Respondent grounded his application solely on the Will of *Ladlee Doss*, the late *Mohunt*, whereby he was appointed successor to the *Mohuntship*; but an assembly of the *Mohunt* of the neighbouring *Mutts* having duly elected the Respondent *Mohunt* in the place and according to the

1867.
GREEDHAREE
DOSS
v.
NUNDOKIS-
SORE DOSS,
MOHUNT.

1867.
 GREEDHAREE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

recommendation of *Ladlee Doss*, he presented to the Judge a petition for leave to withdraw the former one, on the ground that *Ladlee Doss* had no power of disposing of the property of the *Mutts*, of which he was *Mohunt*, otherwise than by recommending the Respondent to be elected by the neighbouring *Mohunts* as his successor, and that the Respondent had since been elected by the *Mohunts* in the place and according to the recommendation of *Ladlee Doss*, and a new petition was accordingly presented by the Respondent as the elected successor to *Ladlee Doss*, for the grant to him of a certificate under Act, No. XXVII. of 1860.

The *Maharajah* of *Burdwan* filed objections to the granting of the certificate, on the ground that he was entitled to be summoned to and to take the leading part in the election of the *Mohunt*, and that he did not receive any notice of any intended meeting of *Mohunts* for the purpose of electing a successor to *Ladlee Doss*, and did not attend any such meeting. Certain *Mohunts* also objected to the grant of the certificate, on the ground that their concurrence was necessary to the validity of the election, and that they had not concurred in it.

While the Respondent's application for the grant of a certificate under Act, No. XXVII. of 1860 was pending, the Appellant presented to the Judge a petition under Act, No. XIX. of 1841, praying that he might be placed in possession of the *Akras* in question, with all the property thereto belonging, as *Mohunt* thereof, by the Will of *Gopaul Doss*, and for preliminary attachment thereof pending inquiry. The Appellant's petition was disposed of on the 21st of *November*, 1860, by Mr. *Taylor*, who had been

appointed Judge of *East Burdwan*, whose judgment was in the following terms:—"After taking the deposition on oath of the Petitioner, *Greedharee Doss*, and perusal of my predecessor's decision in the regular suit, No. 71, between that individual and of the late *Ladlee Doss*, which was decided against the former, and particularly the transaction of the so-called Will of *Gopaul Doss* embodied therein, the Court is of opinion, that the Petitioner had no right of succession, and, therefore, no right to enter his petition under consideration, for the following reasons: First, as the *Mohuntship* is by Hindoo law, and all precedents, elective, it follows that no *Mohunt* can legally make a Will devising it to any person after his death, though he apparently has a right to nominate a successor, whose fitness is thereafter to be taken into consideration by the *Mohunts* who may assemble to elect. This point was not taken into consideration by my predecessor in his decision of suit, No. 71; and the opinion thus expressed by the Court does not contravene his decision in any way. Secondly, all analogies, European and Eastern, show that no head of a Monastic or similar institution can provide in any way whatever, by recommendation or otherwise, for two successors, as *Gopaul Doss* evidently attempted to do in his so-called Will; and thirdly, the deposition on oath of the Petitioner shows that he had not been elected by the *Mohunts* since the death of *Ladlee Doss*." On these grounds the petition of *Greedharee Doss* was rejected with costs.

The Judge, however, on this occasion feeling a doubt whether the Respondent had been duly elected, and was in rightful possession of the property of the *Mohunttee*, eventually thought fit to order such

1867.

GREEDHAREE
DOSS

v.

NUNDOKIS-
SORE DOSS,
MOHUNT.

1867.

GREEDHAREE
DOSS

v.

NUNDOKIS-
SORE DOSS,
MOHUNT.

property to be attached until the day when the Respondent's application under Act, No. XXVII. of 1860 was to be disposed of. This Order for attachment was brought before the *Sudder Dewanny Adawlut* by summary appeal, and was reversed by that Tribunal as having been made without jurisdiction.

On the 7th of *May*, 1862, the Appellant instituted the suit in which the decree now appealed from was pronounced. The plaint was in the following terms: "Suit to set aside the decisions of the Judge under Acts, Nos. XXVII. of 1860, and XIX. of 1841, and according to the Will of the 6th *Feyt*, 1264, and to the immemorial rules and usages of the *Akra* to be put to the *Mohuntship* for the worship of God, to get possession of the properties appertaining thereto, and to be upheld in possession of those properties of which I am in possession, the value being estimated at Rs. 17,95,533, and the cause of action dating from the death of *Ladlee Doss*, in the month of *Kartick*, 1267. The particulars are these: My *Goorodeb*, or spiritual guide, the late *Gopaul Doss, Mohunt*, in the *Guddeesheen*, or the Master of the *Guddee* of the *Akra* of *Rajgunge*, died on the 31st *Feyt*, 1264. *Ladlee Doss*, on producing a Will, and alleging it to have been written by my *Goorodeb*, on the 6th *Feyt*, 1264, opposed my getting possession; but doubts arising as to the genuineness and validity of the Will, I, in order to set aside the Will, instituted the suit No. 71, of 1859, claiming to get possession. The late Judge, considering the Will to be genuine, dismissed my claim on the 6th of *August*, 1860. The words of the Will clearly set forth that, according to the immemorial rules and usages of the *Akra*, and the

intent of my *Gooroodeb*, I am entitled to the *Guddee* only on account of my youth, *Gooroodeb* appointed *Ladlee Doss* to the *Mohuntship*, as my Guardian, and ordered him when he should no longer be able to manage the duties to put me on the *Guddee*. *Ladlee Doss* had no authority to act contrary to that Order. Nevertheless, *Ladlee Doss*, at the time of his death, instead of constituting me the Master of the *Guddee*, appointed his alleged Disciple, *Nundokissore Doss*, the Defendant, to the *Mohuntship*, and by the decisions of the Judge of the *Zillah*, in the suits under Acts, Nos. XIX. of 1841, and XXVII. of 1860, his claim has been admitted, and mine rejected. Accordingly, for the above-mentioned claim I file this suit against the Defendant, the appeal which I have preferred to the *Sudder* Court against the decision in suit No. 71 will only determine whether the Will is valid or not ; but, even if the Will were valid, I, and not the Defendant, would, according to its purport, be the Master of the *Guddee*. Moreover, he has not been installed by the principal *Mohunts* ; particularly he is of such a bad character that he is by no means fit to be *Mohunt*. On these grounds, not waiting for the decision of the appeal, and depending on the Will, I institute this suit for the *Guddee* vacated by my *Gooroodeb Maharaj*, and for possession with *wassilat* of the dispossessed properties, movable and immovable, belonging thereto, and for upholding possession of such properties, of which I am in possession."

The Respondent by his answer, besides objecting on the merits to the plaint, pleaded in bar, among other things, that the plaint had been filed more than a year after the date of the Orders, under Acts,

1867.
GREEDHAREE
DOSS
v.
NUNDOKIS-
SORE DOSS,
MOHUNT.

1867.
 GREEDHAREE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

Nos. XIX. of 1841, and XXVII. of 1860, which was sought to set aside; and that it was consequently barred by clause 5, s. 1, of Act, No. XIV. of 1859, as the suit had not been instituted within one year from the date of those Orders. The Respondent further pleaded in bar that the suit could not be maintained, as it was for the same subject-matter as the suit before mentioned of the Appellant against *Ladlee Doss*, which was still pending.

Both parties then went into evidence. Witnesses were examined as to the usage and custom of the *Mohunts* appointing a successor; some of whom deposed to the election by the assembled *Mohunts*, and installation of *Ladlee Doss* in pursuance of the nomination of *Gopaul Doss*. There was also some evidence, of an unsatisfactory character, of a double *Ticca*, or mark of investiture of both *Ladlee Doss* and the Appellant.

The case came on for hearing before *Baboo Sreenauth Biddyabagish Roy, Bahadoor*, the Principal *Sudder Ameen* of *East Burdwan*, on the 14th of *March*, 1863, who decided all the issues in favour of the Appellant, and pronounced a decree allowing his claim, ordering that he should recover the office of *Mohunt* of the *Akra* of *Rajgunge* and its dependent *Akras*, as mentioned in the plaint, and possession of the estates, as well as costs, with interest, from the Respondent.

From this decision the Respondent appealed to the High Court of Judicature at *Bengal*, which Court, consisting of the Chief Justice, Sir *Barnes Peacock*, and Mr. Justice *Levinge*, by its decree, dated the 24th of *June*, 1863, ordered that the decree of the Principal *Sudder Ameen* should be

reversed, and the appeal decreed with costs and interest. The material parts of the judgment (a) of the High Court were in these terms:—"The Orders of the 21st of *December*, 1860, and the 5th of *February*, 1861, were made more than a year before the commencement of the present suit, which was commenced on the 7th of *May*, 1862; and one question which arose was, whether the Plaintiff's claim, so far as it related to the setting aside of those two Orders, was barred by the period of limitation fixed by cl. 5, sec. 1, of Act, No. XIV. of 1859. The Principal *Sudder Ameen* decided that the Plaintiff's claim was not barred. We think that in that respect he made a mistake, so far as those two Orders are concerned; but this does not affect the whole case, and is not very material, as the question of title may be tried in this suit. The Principal *Sudder Ameen* pronounced a decree that the Plaintiff should recover the properties appertaining to the *Mohunt*, as mentioned in the plaint, without taking any evidence as to whether the properties mentioned in the plaint appertained or belonged to the *Mohunttee* or not. This also was a mistake on the part of the Principal *Sudder Ameen*, but it is not important, as the decree must be reversed. The Will of *Gopaul Doss* is not disputed in this suit, although the effect of it is not certainly stated in the plaint. It was also established by the decree in the former suit, from which the Plaintiff's appeal has been dismissed at his own request. It was objected in this suit that the former and present suit were for the same cause, and, consequently, that this suit cannot, according to sec. 2,

(a) See case reported, 1 Marshall's App. Cases, Bengal, p. 573.

1867.

GREEDHAREE
DOSSNUNDOKIS-
SORE DOSS
MOHUNT.

1867.

GREEDHAREE
DOSS

v.

NUNDOKIS-
SORE DOSS,
MOHUNT.

Act, No. VIII. of 1859, be maintained. But the Principal *Sudder Ameen* decided that point in favour of the Plaintiff. The Principal *Sudder Ameen* treats the decision on *Gopaul Doss's* Will as vesting the property in the Plaintiff, or giving the Plaintiff the right to this *Mohuntship*. The decision of the Principal *Sudder Ameen* is not very clear ; but it says that the Plaintiff is entitled under *Gopaul Doss's* Will, *Ladlee Doss* not having appointed a successor. Then it is said that *Ladlee Doss* never made a Will at all. We do not think that *Ladlee Doss's* Will was ever in dispute. But the Principal *Sudder Ameen* goes on to say, that the Will is a spurious document. He says, that in the first petition *Nundokissore Doss* relied on *Ladlee Doss's* Will, and in the second petition on the allegation that he was elected by several *Mohunts*, and that, therefore, the Will could not be taken to be a genuine one. But the Judge established that Will as a genuine document ; and if the Principal *Sudder Ameen* had looked at the two petitions, he would have found that *Nundokissore Doss*, so far from abandoning the Will, stated that his right to the *Mohuntship* depended on the nominating of *Ladlee Doss* by the Will, and the election by the *Mohunts*, instead of relying on the Will alone. That was no ground for the Principal *Sudder Ameen's* saying, that the Will ought to be considered a spurious document. The first question is, whether the Plaintiff was entitled, under the Will of *Gopaul Doss*, to succeed to the *Mohunttee* upon the death of *Ladlee Doss* ?" The Court then, after referring at length to the Will of *Gopaul Doss* (*ante*, p. 406), proceeded as follows :— " We think it is clear that, even taking this as a Will, *Greedharee Doss* could not derive title by virtue of

the Will itself. There is no evidence in the suit to show that a *Mohunt* who once nominates his successor, has a right to give directions to his successor when his turn to nominate comes, as to whom he should nominate, because the object of appointing a successor to the *Guddee* is to insure the election of a proper successor. Now, every *Mohunt* may be assumed to be a proper person to judge who is best qualified to succeed him and to perform the religious duties of the *Mohunttee*; whereas if any *Mohunt* were to have the power of saying who should succeed his successor, he might be allowed to go on and say who should succeed the successor of that successor, without being able to judge whether the person so nominated would be properly qualified or not when the time arrived. We think that a *Mohunt* has no power to give such a direction. Numerous cases have been cited to show what is the usage; but the law to be laid down by this Court must be as to what is the usage of each *Mohunttee*. We apprehend that if a person endows a College or Religious institution, the endower has a right to lay down the rule of succession. But when no such rule has been laid down it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular *Mohunttee*. As to the *Mohunttee* in question, the Plaintiff has used the evidence of several witnesses whom the Principal *Sudder Ameen* has considered to be respectable, and who say that the *Mohunt* must first appoint his principal Disciple, and, if there be no principal Disciple, a spiritual Brother; and, in the absence of such spiritual Brother, he may appoint the grandson to succeed him as *Mohunt*. In the suit

1867.

GREEDHAREE
DOSS

v.

NUNDOKIS-
SORE DOSS,
MOHUNT.

1867.
 GREEDHAREE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

between the Plaintiff and *Ladlee Doss*, the predecessor of the present Defendant (who claims through him by virtue of a Will), it was distinctly ruled that, according to the Hindoo law, *Gopaul Doss* had the power to appoint *Ladlee Doss* as his successor. The Plaintiff appealed from that decision; and he might have contended that, according to the Hindoo law and the evidence in the case, *Gopaul Doss* had no power to appoint a successor. But the Plaintiff has abandoned that appeal, and has, consequently, admitted that the decision of the Judge upon that point was a good and valid decision. Therefore, independently of what is found in the evidence as it is now before us in this suit, we find that the Plaintiff is bound by that decision, and that by the Plaintiff's evidence in that suit (which has not been brought before us) it is proved that *Gopaul Doss* had a right to appoint *Ladlee Doss* as his successor. It appears that the Defendant applied to the Judge, Mr. *Taylor*, for a certificate under Act, No. XXVII. of 1860, and that Mr. *Taylor*, on the Defendant's second petition (not upon the first petition, because it was withdrawn because it had not been drawn up correctly) declared in favour of the Defendant's rights. It may be said that that declaration would be no evidence against the Plaintiff, inasmuch as the Plaintiff was not then one of the Objectors. But it is necessary for us to look at that Order, when we are asked by the Plaintiff in this suit to set it aside. We think that without deciding whether Mr. *Taylor's* decision was founded on correct facts, he has apparently treated the case as one of election. It is now contended by the learned Counsel for the Plaintiff, that this is not a case of election, but that it is the case of an hereditary

1867.
 GREEDHAREE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

Mohuntee. But still, whether put upon the ground of election or not, we think that Mr. *Taylor* came to a right conclusion when he passed an Order in favour of the Defendant. The Judge was also right when he refused, upon the application of the Plaintiff, to appoint a Receiver under the Official Trustee's Act. If the case depended on election, the Plaintiff must establish that he was elected. Therefore, even if the Defendant's election was a bad one, that does not entitle the Plaintiff to come in and ask to be put in possession of these large estates, without first proving that he was duly elected. We do not see that it has been made out in any way that there had been an irregular election. We think that the evidence in this case shows that a *Mohunt* has the power to appoint his successor from among his Disciples or spiritual brethren; that in this case *Gopaul Doss* did appoint *Ladlee Doss* as his successor; that he had no power, according to the usage of this *Mohuntee*, to give any directions to *Ladlee Doss* as to whom he should appoint as his successor; that, consequently, this part of *Gopaul Doss's* Will is not binding on *Ladlee Doss*; that *Ladlee* was duly installed in the *Guddee* by the other *Mohunts*; that the *Mohuntee* became vested in him, and he became *Mohunt* of that *Mohuntee*; that he, whilst *Mohunt*, having fallen sick, and wishing to appoint his successor, had the full power to appoint his own successor without reference to that instruction of *Gopaul Doss*; that, even if *Ladlee Doss* was bound to follow that instruction, he was not bound to appoint *Greedharee Doss* as his successor unless he considered him competent; and that *Ladlee Doss* did not consider *Greedharee Doss* competent, and, therefore, instead of appointing him, appointed the Defendant his

1867.
 GREEDHAREE
 DOSS
 7.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

successor. Under these circumstances it appears to us that *Ladlee Doss's* appointment of the Defendant did vest the estate in the Defendant, and that the Plaintiff is not entitled to recover. But even if the estate was not properly vested in the Defendant, the Plaintiff had no right in this suit to divest the Defendant of the possession without establishing his own title, which he has not done. We, therefore, think that the decision of the Principal *Sudder Ameen* must be reversed and this appeal decreed, with costs and interest."

Against this decision of the High Court the present appeal was brought.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

First, by right of representation, as well as by the Will and the verbal appointment by *Gopaul Doss*, the Appellant was entitled to succeed to the office of *Mohunt* and the estates attached thereto. The Appellant, as *Shishya*, favourite *Chella*, having been so designated and nominated by him in his lifetime to the *Mohuntship* of the *Akra* at *Rajgunge*, became entitled by hereditary right to succeed as soon as he attained mature age. The Will produced and acted on by *Ladlee Doss*, as the Will of *Gopaul Doss*, affirmed the Appellant's right to the *Mohuntship* in succession to *Gopaul Doss*, notwithstanding such Will purported to appoint *Ladlee Doss* to act intermediately, which, if it meant anything, meant only until the Appellant should attain mature age. The office is a charitable trust descendible to a successor properly designated: The *Dayá-bhaga*, Ch. XI. sec. 6, par. 35; *Daya Kram Sangraha*, pp. 28, 35, 36; *Vyavastha*

1867.
 GREEDHAREE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

Durpuna of Shamachurn Sircar, p. 297; *W. H. Macnaghten's "Hindu Law,"* Vol. II. p. 101; and, in common with other religious establishments in *Bengal*, the superintendence is, by usage and custom, on the death of the *Mohunt*, elective by the neighbouring *Mohunts*; *Strange's "Hindu Law,"* Vol. I., p. 151, [2nd Edit.]; and the appointment by the principal of a successor is good by the Hindoo law and usage: *Gunes Gir v. Amrao Gir* (a); *Ramrutun Das v. Bunmalee Das* (b); *Gunga Das v. Tiluk Das* (c); *Narain Doss v. Bindrabun Doss* (d); *Dhunsing Gir v. Mya Gir* (e); *Mohunt Rama Nooj Doss v. Mohunt Debraj Doss* (f); *Govind Doss v. Ramsahoy Femadar* (g). If the Will is to be considered and treated as a legal and binding instrument, giving a preferential right to the *Mohuntship* to *Ladlee Doss*, yet such appointment having been coupled with a special condition and imperative direction, to the effect, that when *Ladlee Doss* should feel himself incapable of fulfilling the duties of the *Mohuntship* he should appoint the Appellant, the Will is, Sir LAWRENCE PEEL: Does it amount to a precatory trust? It may be so, but *Ladlee Doss* was bound, on accepting such appointment, to carry out and give effect to the direction, and ought, therefore, to have appointed the Appellant to the *Mohuntship*, and not the Respondent. The ground alleged by *Ladlee Doss* for refusing to carry out the Testator's intentions was without foundation. The hereditary right of the Appellant to succeed to the

(a) 1 Ben. Sud. Dew. Rep., 218. (b) 1 Ben. Sud. Dew. Rep., 170.

(c) *Ib.* 309.

(d) 2 Ben. Sud. Dew. Rep., 151.

(e) 1 Ben. Sud. Dew. Rep., 153. (f) 6 Sud. Dew. Rep., 262.

(g) 1 Fulton, 217.

1867.

GREEDHAREE

DOSS

v.

NUNDOKIS-

SORE DOSS,

MOHUNT.

Mohuntship, after the intermediate temporary *Mohuntship* of *Ladlee Doss*, was admitted by the Respondent. The evidence shows that the Appellant received joint *Ticca*, and joint investiture and installation, and subsequent election by the assembled *Mohunts*; having, therefore, survived *Ladlee Doss*, and arrived at mature age, he ought to have been declared by the decree of the High Court the *Mohunt* of the *Akra*.

Secondly, the Appellant being the spiritual heir of *Gopaul Doss* and a member of the *Akra*, and one of the joint heirs of the whole property, had a sufficient interest to support the present suit, *Ben. Reg. XIX.* of 1810, sec. 15. The *Mohunt*, or head, is only a Trustee for the whole body of the members of the *Akra*. The Respondent cannot be entitled to the *Mohuntship* under the appointment contained in the Will of *Ladlee Doss*, because that appointment is at best only temporary. His subsequent election at an assembly not duly convened, and receiving *Ticca* from inferior *Mohunts*, was wholly irregular and illegal, and, therefore, void. He has failed to prove his nomination by *Ladlee Doss* in his lifetime as became entitled or that by the custom and usage, or that he was the *Akra* at *Rajgunge*, a *Mohunt* had the power of appointing a successor by will to take effect after his death.

Mr. *James*, Q.C., and Mr. *Macpherson*, for the Respondent, were not called on.

Judgment was delivered, as follows, by

The Right Hon. Lord ROMILLY:—

Their Lordships do not think it necessary to hear Counsel on behalf of the Respondent in this case.

They have come to the conclusion that the decision of the High Court of Judicature is proper to be affirmed by Her Majesty. It is an appeal from the High Court, which reversed a decree of the Principal *Sudder Ameen* of *Zillah East Burdwan*, which was in favour of the Appellant; and the only facts in the case to which their Lordships think it necessary to refer are those which I am about very shortly to state.

It appears that *Gopaul Doss* was the *Mohunt* of the *Akra*, a religious institution wealthily endowed, at *Rajgunge*, in the *Zillah* of *Burdwan*. In the year 1857, being afflicted with illness, and expecting shortly his dissolution, he made his Will. It is addressed to *Ladlee Doss*. In it he refers to the illness he was labouring under, and, after referring to the *Akra* of *Rajgunge* and the subordinate *Akras*, he says:— [His Lordship read the extract from the Will, *ante*, pp. 406–7.]

In this case two questions arise, one on the construction of this Will, and another independently of the Will itself. The question on the construction of the Will is, whether there is an absolute gift of the *Mohuntship* to the Appellant, *Greedharee Doss*, as soon as he becomes competent to perform the duties, or whether the gift of the *Mohuntship* is in reversion after the incapacity of *Ladlee Doss*. The question, independent of the Will, is whether, if there be such a gift contained in the Will, there exists such an authority within the power of a *Mohunt* as to enable him to make such a gift.

Their Lordships are of opinion, that the points which depend on the contents of the Will itself must be decided against the Appellant in the present

1867.

GREEDHAREE
DOSS
v.
NUNDOKIS-
SORE DOSS,
MOHUNT.

1867.
 GREEDHAREE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

suit. They think, in the true construction of the Will, that it does not give the Appellant an absolute, positive, unqualified right at any time to the *Mohuntship*, even on the incapacity of *Ladlee Doss* to perform the duties of *Mohunt*. They think, until *Ladlee Doss* becomes incapable, no trust or duty is suggested, and that even when *Ladlee Doss* becomes incapable, it cannot be put higher than Sir *Roundell Palmer* himself put it, viz. as a gift in the nature of a precatory trust—that is, one requesting *Ladlee Doss* to perform the wishes of the Testator, and to appoint the Appellant his successor, provided he found that the incapacity which then existed in the Appellant (who was not then of sufficient age to be appointed *Mohunt*) should cease to exist at the time when *Ladlee Doss* was unable to perform those duties.

It is, therefore, clearly unnecessary for their Lordships to consider the second question, whether, in point of law, a grant of *Mohuntship* can be made by any holder of the Office with the superadded obligation imposing on the Grantee the necessity of following the wishes of the Grantor as to the person whom he is to appoint to be his successor in that Office.

It is to be observed that the only law as to these *Mohunts* and their offices, functions, and duties, is to be found in custom and practice, which is to be proved by testimony; and no evidence has been adduced before their Lordships to show that any appointment has ever been made in reversion on any former occasion.

The only question, therefore, which their Lordships have to consider on the present occasion is, whether in this state of circumstances, in the events

which have subsequently occurred, the Appellant has obtained any right which can entitle him to be placed in that particular situation on the decease of *Ladlee Doss*, in the absence of any compliance by him with the wishes of his Testator or Grantor.

1867.
GREEDHAREE
DOSS
v.
NUNDOKIS-
SORE DOSS,
MOHUNT.

The facts are these : *Gopaul Doss*, after executing his Will, died in *June*, 1857, and thereupon *Ladlee Doss* was installed or invested as *Mohunt* ; and it is to be observed that the other *Mohunts* placed the same construction upon the Will that their Lordships have placed by electing him. Accordingly, as the *Maharajah* (who, as chief Benefactor and Patron,) had invested him with the full *Mohuntship*, they gave him the *Ticca*, or mark of investiture. They did not merely appoint *Ladlee Doss*, *Adhicarry*, or Agent, which, according to the contention of Sir *Roundell Palmer* and Mr. *Leith*, was the extent of the *Maharajah's* authority. It is plain that the other *Mohunts* considered him to be entitled to have the full *Mohuntship*, and he was fully invested with the *Ticca* accordingly.

Mr. *Leith* has called their Lordships' attention to some evidence which was intended to show that there was a double *Ticca*. What the nature of that double *Ticca* was does not very clearly appear. This seems to be clear, from all the evidence in this case, as far as it has been brought under their Lordships' attention,—that there cannot be two existing *Mohunts* ; that the office cannot be held jointly ; and that, therefore, if there was a double *Ticca* at all, it must have been a *Ticca* of the office in reversion after the existence of the incapacity of *Ladlee Doss* to perform the duties. But the evidence upon that

1867.
 GREEDHARE
 DOSS
 v.
 NUNDOKIS-
 SORE DOSS,
 MOHUNT.

point, and the law adduced upon the subject before their Lordships, fail entirely to satisfy their minds that any such species of investiture was according to the rules and customs of these *Mohunts*, or that any such *Mohuntship* can be given in reversion.

They therefore consider that *Ladlee Doss* was invested as the *Mohunt* of the *Akra*.

This was the view also taken in the Court in *India* when the suit was instituted in *September*, 1859, by the Appellant against *Ladlee Doss*, insisting that he was entitled to be appointed on the ground that he was then capable, and that his right arose as soon as he was so. He appealed from that decision, and the decision was affirmed.

Mr. *Leith*.—He withdrew his appeal.

THE MASTER OF THE ROLLS.—Yes, he withdrew the appeal, but not till after the death of *Ladlee Doss*.

Ladlee Doss died on the 5th of *November*, 1860, and upon his death *Nundokissore Doss* received the *Ticca*.

Their Lordships are of opinion, that it is not necessary for them—nay, more, that it is very undesirable for them—to go into the question of whether the Respondent was duly appointed *Mohunt* or not. They are of opinion, that that is not the question which they have to determine; because, for the present Appellant to succeed in this case, he must succeed by force of his own title, and not by the infirmity of the Respondent's title.

Mr. *Leith* suggested that the *Mohunt*, or any person connected with the establishment of the *Akra*, would have a right to contest the appointment of the Respondent as *Mohunt*, and he insists that it has

become necessary that that question should be determined. If that be so, their Lordships are of opinion, that it must be raised in a suit properly framed for that purpose. Without expressing any opinion upon the point itself, they are of opinion, that this is not a suit properly framed for that purpose.

Their Lordships observe also that the Judges of the Court of appeal, the High Court of Judicature, make use of these expressions, which are strongly confirmatory of this view of the case: "We can understand," they say, "a suit being brought to set aside the election of the Defendant, and to order the *Mohunts* to make a new election; but this was not a suit to set aside the election, but to put the Plaintiff in possession of the whole estate. So it was in the case cited, *Gunga Doss v. Tiluk Doss* (a). It was a suit to recover the office of *Mohunt*, together with the lands attached to it. Supposing we thought the election of the present Defendant an improper one, what authority have we to direct a new election?" (b)

This is the view which their Lordships took of the case below, and their Lordships here have only had to consider whether, upon the case brought before them, the Appellant has made out his title?

It is not for them to consider whether he has shown any infirmity whatever in the title of the Respondent; but whether he has made out a satisfactory case to entitle him to recover the office and the land and property belonging to the office of *Mohunt*.

Upon a complete review of the case, their Lord

(a) 1 Select Report, p. 309.

(b) 1 Marshall's App. Cases, Bengal, 588.

1867.
GREEDHAREE
DOSS
v.
NUNDOKIS-
SORE DOSS,
MOHUNT.

1867.

GREEDHAREE
DOSS
v.
NUNDOKIS-
SORE DOSS,
MOHUNT.

ships are of opinion, both on the construction of the Will and the evidence brought before them of the facts which have occurred throughout (which they think it unnecessary to detail with greater minuteness), that the Appellant has completely failed in the attempt to set up his own title, and that, consequently, the decision of the Court below, which simply asserts that he has failed to establish any title of his own, ought to be affirmed, and their Lordships will humbly advise Her Majesty to direct that this appeal be dismissed, with costs.

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

BABOO DHUNPUT SINGH ... *Appellant;*

AND

GOOMAN SINGH, MUDDUN LALL } *Respondents.**
DOSS, and others ... }

*On appeal from the High Court of Judicature at
Bengal.*

SUIT for enhancement of rent.

The suit was instituted under Act, No. X. of 1859, in the Court of the Collector of *Zillah Purneah*, by *Baboo Purtab Singh*, the Father of the Appellant, as *Zemindar*, against the Respondents, to recover

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Cairns (Lord Justice), the Right Hon. Sir James W. Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.

"*Mocurrery*," or equivalent words of limitation, as "from generation to generation," it is not *primâ facie* to be assumed to grant a *Mocurrery-istimrari*, or perpetual tenure, but evidence of long uninterrupted enjoyment, at a fixed unvarying rent, will supply the want of words of limitation in such *Pottah*.

25th, 27th, &
28th Nov.,
1867.

A Pottah is a generic term, embracing every kind of engagement between a *Zemindar* and his Tenants, or *Ryots*. If the *Pottah* does not contain the term

1867.

BABOO
DHUNPUT
SINGHv.
GOOMAN
SINGH.

from them the sum of Rs. 26,752. 6a. 9p. for enhanced rent claimed by him from the Respondents, or those from whom they derived title, subsequent to the enhancement of the rent, according to the *Pergunnah* rate after admeasurement of the lands.

The principal question raised by the suit and on appeal had reference to the construction and effect to be given to an instrument of title known as a "*Pottah*." This instrument was dated the 19th *Sawun*, 1199 *Fusly* (23rd July, 1792), and was in the following terms:—" *Pottah* in the name of *Aghum Singh, Chinturea Moostager* [Farmer] of *Mouzah Chelonnee, Bhulwahee, Billahee*, and other villages, in Forests of *Sukhooa* trees, appertaining to *Zillah Nathpoo* in *Pergunnah Durrumpoor, Sircar Moonghyr*, within the Province of *Behar*. Whereas in accordance with your petition, the lands of the villages in the said Forests have been assessed at the sum of Rs. 101, *Sunwah Azeemabadee*, of full weight, everything being consolidated, and a *Pottah* granted to you. It is required that you will in all confidence locate on the lands of the said Forests '*Purbuttea*' (Hillmen), and other *Ryots*, and annually keep paying the revenue to the *Sircar*

Where, therefore, a *Pottah*, dated in 1792, was granted to the predecessor in title of *A.* by the predecessor in title of *B.*, addressed to him as "*Moostager*" or Farmer, without any words of limitation, and the property comprised in the *Pottah* remained in the uninterrupted possession of the Lessee and his successors at a fixed rent up to the year 1861, it was held, that such long and uninterrupted possession conferred a sufficient title to defeat the right of the then Landlord to an enhancement of rent under the provisions of Act, No. X. of 1859.

A purchaser under a decree in a civil suit takes merely the right, title, and interest of the judgment Debtor, and is subject to the subsisting interests in the land which have been granted or created by any former *Zemindar*.

Section 23rd of Act, No. X. of 1859, confers on the Collector of the District where the property is situate, jurisdiction in all suits, whether they be for the determination of the rate of rent at which a *Pottah* or *Kabooleat* should be given, or for arrears of rent due on account of land.

(Proprietor) agreeably to this *Pottah*; whenever you may be summoned on account of hunting, you will attend with all the '*Purbutteas*.' "

This instrument was relied upon by the Respondents as conferring on them a *Mocurrery* tenure, amounting to such a permanent transferable interest, as would exempt the lands from enhancement of rent within the saving clauses of sections 15 and 16 of the Act, No. X. of 1859 (a).

By the decree of the High Court on review of judgment, it was declared, that the above *Pottah* created a *Jungleboory* tenure, *i. e.* a tenure held on condition of the Lessee clearing away jungle, and bringing the land into a productive state, and settling *Ryots* thereon; and that under such a *Pottah* the Tenants were not protected from enhancement of rent, but, on the contrary, were liable to the payment of enhanced rent in respect of all lands which the Lessee might bring into cultivation as established under the provisions of *Ben. Reg. VIII.* of

(a) Section 15 enacts that, "No dependent *Talookdar*, or other person possessing a permanent transferable interest in land intermediate between the Proprietor of an estate and the *Ryots*, who in the Provinces of *Bengal, Behar, Orissa, and Benares*, holds his *Talook* or tenure (otherwise than under a terminable lease), at a fixed rent, which has not been changed from the time of the permanent Settlement, shall be liable to any enhancement of such rent, anything in section LI., Regulation VIII. 1793, or in any other law to the contrary notwithstanding."

Section 16, "Whenever, in any suit under this Act it shall be proved, that the rent at which a *Talook* or other tenure is held in the said Provinces, has not been changed for a period of twenty years before the commencement of suit, it shall be presumed that such *Talook* or tenure has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown, or it be proved that such rent was fixed at some later period."

1867.
 BABOO
 DHUNPUT
 SINGH
 v.
 GOOMAN
 SINGH.

1867.
 BABOO
 DHUNPUT
 SINGH
 v.
 GOOMAN
 SINGH.

1793, sec. 8. The decree further declared, that the *Pottah* did not in its terms create a *Mocurrery* tenure, and that the Respondents were not within, and could not claim to hold under, the *Pottah*, nor be bound by its terms and legal operation, as the original Lessee was; but it also declared, that the Respondents were to be considered and treated as acquiring title to and getting possession of the lands in question, independently of the *Pottah*, and the decree found, that their title accrued subsequently to the Permanent Settlement; and that it having been proved that they had paid rent at the same rate for a period of twenty years before the commencement of the suit, it should be presumed, under the provisions of section 16 of Act, No. X. of 1859, that the lands had been held at that fixed rent from the time of the Permanent Settlement, so as to bring the Respondents within the exception of section 15 of that Act.

The facts of the case were as follows :—

Baboo Pertab Singh, the Father of the Appellant, purchased in the year 1259 *Moolky* Era (A. D. 1851–2), at an auction sale under a decree of the Court of the *Zillah Purneah*, a *Zemindary*, called *Zillah Nathore*, *Pergunnah*, *Hurrawut Singhea*, together with half of *Pergunnah*, *Futtehpore*, situate in the District of *Purneah*.

It appeared that a dispute had ensued between the late *Zemindar* and *Baboo Pertab Singh*, the purchaser, which was not settled till 1266 *Moolky* Era (A. D. 1858), until which time the latter, it was alleged, was unable to ascertain what persons were in possession of the lands within that *Zemindary*.

On the 13th of *March*, 1860, a petition was pre-

sented by *Baboo Pertab Singh*, to the Collector of *Zillah Purneah*, which stated that, a notice for the enhancement of rent, addressed to the parties in possession of the lands, had been filed therewith, in accordance with the provisions of section 13, of Act, No. X. of 1859; that the rent of 11,645 *beegahs* of land, the ascertained admeasurement of the estate so purchased, had been fixed at Rs. 24,842. 10a. 8p. at the rate of Rs. 2 per *beegah*, according to the quality and capability thereof, and praying that the notice might be issued by the Court, in pursuance of the above Act, to the parties in possession of the land, and that the rents might be allowed to be collected, in accordance therewith, from the year 1267 *Moolky* Era (A. D. 1858). Notice was ordered by the Collector to be issued, and it was served on the parties in possession.

It appeared that on the death of *Aghum Singh*, his two sons, *Pertab Singh* and *Neerbhan Singh*, succeeded him in the possession of the lands mentioned and granted to him in the *Pottah*. On their death, their respective moieties in the lands were taken possession of by their heirs-at-law, and at the time when the Appellant's Father acquired the above-mentioned *Zemindary*, they were in possession of the lands, with the exception of a one and a quarter *anna* share (the whole being nominally divided into 16 *annas* shares), which had been previously sold under a decree of the Court of the Principal *Sudder Ameen* of *Zillah Purneah* to the Respondent, *Muddun Lall Doss*, who afterwards purchased another share, being $6\frac{3}{4}$ *annas* share out of the other undivided moiety belonging to the sons of *Neerbhan Singh*, deceased; and he also bought a further share, being 17g. 3c.

1867.

BABOO
DHUNPUT
SINGH
v.
GOOMAN
SINGH.

1867.

BABOO
DHUNPUT
SINGH

v.
GOOMAN
SINGH.

and 1d. of the remaining portion of the undivided moiety of the sons of *Pertab Singh*.

At the time of the commencement of the suit, out of which the present appeal arose, *Muddun Lall Doss* was in the possession and enjoyment of an undivided share of 14a. 4g. 1c. 2k. and 1d. of lands; and the Respondent, *Biddabutty*, as Widow and heiress-at-law of *Pidrut Singh*, deceased, was in like possession of another 1a. 12g. share of the same; and the Respondent, *Radhabutty*, the wife of the Respondent, *Gooman Singh*, was in possession by purchase of the remaining share of 4g. 1c. and 2k. of the same.

Baboo Pertab Singh, the purchaser of the *Zemindary*, died after the above notice was served, and before he could institute a suit against the parties in possession to enforce the payment of the enhanced rent. He was succeeded in his *Zemindary* by the Appellant, his son and heir-at-law.

On the 13th of *August*, 1861, the Appellant brought a suit in the Court of the Collector of *Zillah Purneah* against *Gooman Singh* and the other Respondents, in which he sought to recover in respect of the lands the sum of Rs. 26,752. 6a. 9p. for arrears of rent due on the enhancement up to the end of 1268 *Fusly* (A.D. 1861), under the provisions of section 13 of Act, No. X. of 1859.

The plaint set forth the circumstances above stated, and the notice for the enhancement of rent.

By the statement, by way of answer, filed by the Respondent, *Muddun Lall Doss*, he claimed title to the lands by purchase from the heirs of *Aghum Singh*, the original Lessee, under the aforesaid *Pottah*, which he contended created a *Mocurrery-istimrary* tenure,

held at a fixed rent of Rs. 101, as therein mentioned, and he submitted, that there could not be an enhancement of the rent of such a tenure agreeably to the provisions of sections 4, 15, & 16 of Act, X. of 1859; and further, that the former Proprietors had all along continued to pay the rent to the *Zemindar*, year by year, and received *dhakilas* (receipts) for the same under the designation of *Mocurrerydars*, and that he and they were in possession according to boundaries set forth in a map therein referred to. That the rent of Rs. 101 had continued uniformly and more than twenty years; and at no time had there been any increase or decrease, and that it could not now be altered or increased. He also filed a supplemental statement, insisting that the notice for payment of the arrears of rent was irregular because issued for arrears of rent of the year 1267, when the suit claimed arrears for the year 1268 by virtue of such notice, and that the *Ameen* did not properly measure the lands.


The Respondent, *Gooman Singh*, also filed a written statement by way of answer to the plaint, to the effect, that he claimed title to the lands in question through his grandfather, the original Lessee, *Aghum Singh*; that the latter had acquired the same as a *Mocurrerydar* under the aforesaid *Pottah* at the rental of S. Rs. 101; that he and the other occupants had paid the rent year by year, and had obtained receipts as *Mocurrerydars*, and that, therefore, under sections 4, 15, and 16 of Act, No. X. of 1859, there could not be any enhancement of rent.

The Respondents, *Biddabutty* and *Radhabutty*, by their joint answer, also respectively claimed through the original Lessee, *Aghum Singh*, and under the

1867.

BABOO
DHUNPUT
SINGH
v.
GOOMAN
SINGH.

1867.


 BABOO
 DHUNPUT
 SINGH

 v.
 GOOMAN
 SINGH.

Pottah, which they also alleged was a *Mocurrery* at an annual rental of S. Rs. 101, and which rent had been paid yearly to the *Zemindar*; and they insisted that under Act, No. X. of 1859, there could not be an enhancement of a *Mocurrery* rent.

The issues in the suit were:—First; was the notice of enhancement duly served? Secondly, did the notice contain all that it ought to do; and was it served in the prescribed time? and, thirdly, was it a case in which enhancement could be made, or was Defendants' *Pottah* a *Mocurrery* one?

The *Pottah* was put in evidence, the genuineness of which was not disputed.

The hearing of the suit took place on the 31st of *March*, 1862, before Mr. *W. L. Robinson*, the Collector of *Zillah Purneah*, who pronounced the following judgment:—"The first issue I decide in the Plaintiff's favour; the notice seems to have been duly served, though not personally. The second issue I decide partly in the Plaintiff's favour; the notice, I think, contained sufficient information of the reason for seeking enhancement; but then the Plaintiff has neglected to bring any proof, as he ought to have done, that his enhancement is such as can be legally enforced. The third and most important issue I decide against the Plaintiff. The Defendants produce a *Pottah*, said to be a *Mocurrery* one, dated so far back as 1199 *Fusly*, corresponding to 1792, A.D. They also produce '*Farrigs*' for various years between 1225 and 1240, and decrees for rent in other years at the rate mentioned in the *Pottah*. The land, moreover, was declared free of assessment in a resumption suit, instituted under *Ben. Reg.* II. of 1819. I consider, therefore, that possession of the land at the rate of rent

stated in the *Pottah* for very many years, had been fairly proved. In fact it is not questioned, and the Plaintiff does not say that the Defendants did not hold the land. He only asserts, that they hold more than they are entitled to. It, therefore, falls upon him to state what they are entitled to hold, and that he cannot do. I see attempts have been made in the evidence to say that he was only entitled to a few hundred *beeghas* under the original grant ; but there is no proof whatsoever that such was the case. The *Pottah* produced by the Defendant does not, it is true, state the amount of the land, nor does it say that he was to hold it for ever at that rate, and, therefore, the Plaintiff objects that it is not a *Mocurrery Pottah*, but I cannot admit the validity of this objection ; it is not, I think, necessary that a *Pottah*, to be a *Mocurrery* one, should contain those exact words. It is very fairly proved that the Defendant has held under that *Pottah*, at one rate, for nearly seventy years ; and if he or his Ancestors got hold of more land than they were entitled to, it was the fault of those who preceded the Plaintiff. I am not quite sure that the notice for enhancement should not have stated exactly how much land the Plaintiff claimed to assess, beyond what was covered by the *Pottah*, but perhaps he could hardly be expected to give such detail. On the main point, however, I think there can be no doubt, namely, that the Defendants prove that they have held for over seventy years at one rate ; and that the Plaintiff fails totally to prove that his enhancement was a fair one, or at a rate which could be enforced under the provisions of Act, No. X. of 1859. For these reasons I dismiss the case with costs."

The Appellant appealed to the late *Sudder Dewanny*

1867.
BABOO
DHUNPUT
SINGH
v.
GOOMAN
SINGH.

1867.

BABOO
DHUNPUT
SINGH
v.
GOOMAN
SINGH.

Adawlut of Bengal, stating the following grounds of appeal :—First, that by reason of the copy of the *Pottah* produced by the Respondents being apparently dated the 19th *Sawun*, 1199 *Fusly*, without setting the boundaries, and the quantity of lands, and merely stipulating for the payment of the rent thereof from year to year, it could never be deemed to be permanent and "*Mocurrery*." Secondly, that the copy of the *Pottah* contained no condition of possession and enjoyment from "generation to generation" (*Nuslun-bad-Nusl*). And that by reason of this also, agreeably to the precedents of the Court, after the death of the Grantor of the *Pottah*, such a *Pottah* could not be maintained. Thirdly, that the mere possession of *Ryots* by reason of the non-exercise of the Proprietor's power, could not be held to fix the rent. Fourthly, that by means of a *Pottah*, which fixes neither the boundaries nor the quantity of land, but merely mentions the yearly rent to be Rs. 101, the possession of a quantity of land in excess, being 11,000 *beegahs* without payment of rent, according to the *Pergunnah* rate, was not valid. Fifthly, that it did not appear what quantity of land the receipts produced by the Respondents were for, and hence they could not prevent the assessment of the lands in dispute; and lastly, that according to the facts disclosed by the record, the Appellant's claim ought to be decreed, and the Collector's decision reversed.

The hearing of the appeal took place on the 13th of *May*, 1863, before Messrs. *A. Roberts* and *E. Jackson*, two of the Judges of the High Court of Judicature at Bengal, who delivered judgment to the effect, that the fact that the Respondents' title originated anterior to the Permanent Settlement, was

proved from the date of the *Pottah* ; that the fact that the Respondents had held the lands at a fixed rate of rent from the Permanent Settlement was also proved by the receipts of 1225, 1227, 1228, and 1229, and the decree obtained in 1855 ; that though the *Pottah* did not in its terms confer any *Mocurrery* title, and though the statement of the Appellant's father, and the receipts alluding to the Respondents as *Mocurrereedars* would not, in absence of all *Mocurrery* title in the original lease, confer any such title or form an estoppel to the Appellant's suit ; yet that the law as declared by Act, No. X. of 1859, conferred a *Mocurrery* title on all *Ryots*, in the position of the Respondents, who held lands at fixed rates which had not changed from the Permanent Settlement, and prevented the enhancement on such rents, and conferred a presumptive title to a fixed rent ; and that as the Respondents had proved that the rate of rent of their tenure had been fixed and unchanged for a period of seventy years, or prior to the Permanent Settlement, it could not be enhanced, and the appeal must, therefore, be dismissed with costs, and interest at 12 per cent. per annum on the costs, to the date of payment.

The Appellant presented a petition for a review of judgment to the High Court, in support of which he alleged the following grounds :—First, because it had not been proved, as required by section 15, Act, No. X. of 1859, that the Respondents had held at a fixed rent, which had not been changed from the time of the Permanent Settlement of *Purneah*, which was completed in 1791, whereas the Appellant's own document showed that his tenure dated from the year 1792. Secondly, because, supposing it to be ruled that the

1867.

BABOO
DHUNPUT
SINGH

7.

GOOMAN
SINGH.

1867.

BABOO
DHUNPUT
SINGHvs.
GOOMAN
SINGH.

Permanent Settlement dated from a period posterior to the date of the Respondents' *Pottah*, it was of no consequence that the Respondents had held at a rent which had not since been changed ; inasmuch as, according to the provisions of section 15 of the Act, the Respondents' right must be determined by the terms of the *Pottah*, which conferred no *Mocurrery* title of any sort whatever. That the Court had proceeded, in its decision upon the provisions in sections 3 and 4 of Act, No. X. of 1859, which were specifically applicable to *Ryots* only, whereas the Court ought to have proceeded under the provisions of sections 15 and 16 of the Act, relating to persons possessing a transferable interest in the land intermediate between the Proprietor of an estate and the *Ryots*, such as the Respondents in the present case were ; that between sections 15 and 16, and sections 3 and 4, there was this material distinction : that, under the former, the right may be dependent on the conditions of a lease ; whereas under the latter it would be independent of the conditions of any lease. That the argument of the Court in disregarding the conditions of the *Pottah* would have been correct, supposing the Respondents' case rested on the provisions of sections 3 and 4 ; but as it did not rest on these provisions, but on the provisions of sections 15 and 16, the argument which was based on the provisions of sections 3 and 4 was entirely reversed, and the question must be considered not as one of prescriptive right, but as one dependent on the terms of the *Pottah*.

The hearing on review of judgment took place before Messrs. *W. S. Seton Karr*, and *E. Jackson*, two of the Judges of the High Court of Judicature, on the 5th of *May*, 1864, when the following judg-

ment was given :—“ The first question to be determined is, whether the tenure commenced anterior or subsequent to the Permanent Settlement. The *Pottah* is dated 11th *Srabun*, 1199, which corresponds to the English year 1792. It was on this point urged that the Permanent Settlement was identical with the Decennial Settlement; that in fact it was the Decennial Settlement subsequently made perpetual; that the Decennial Settlement of this District was completed in 1789, and though it was not made perpetual until 1793, still the Settlement which is now called the Permanent Settlement is that which was originally made, and must be held, therefore, to bear the date of the original Settlement, viz. 1789; that if this is the correct date of the Permanent Settlement the protecting clauses of Act, No. X. of 1859, will not bar the enhancement of the rent of the tenure, whatever description of Tenants the Respondents may come under, as their own *Pottah* is proof that the tenure originated subsequent to the Settlement. We think, that the date of the Permanent Settlement must be held to be that on which, the Decennial Settlement being declared to be perpetual, the Permanent Settlement came into force. The Proclamation which declared the Settlement to be permanent is contained in Reg. 1 of 1793; and that Regulation distinctly lays down the date from which it is to have force and effect, viz. the 22nd of *March*, 1793. In deciding this question, the Court cannot, as suggested, act upon the usual law of settlements and contracts, but must be guided by the distinct enactment of the Legislature, which has declared the exact date when the Permanent Settlement came into force. The tenure which is now in dispute, we hold, has been

1867.
 BABOO
 DHUNPUT
 SINGH
 v.
 GOOMAN
 SINGH.

1867.

BABOO
DHUNPUT
SINGH

v.
GOOMAN
SINGH.

proved to have commenced anterior to the Permanent Settlement, and it is not denied that the rent paid for it has remained fixed and invariable up to the present date. The next question is, whether the tenants are *Ryots* or Tenants intermediate between the Proprietor and the *Ryots*. We cannot agree with the learned Counsel for Respondents that they are *Khodkast Ryots*. We think that this Court was in error in its first decision of this appeal in designating them as *Ryots* at all. It is very difficult to lay down any general interpretation of the word '*Ryots*.' As a general rule they are the cultivating Tenants, but they may not be cultivators at all themselves; they may cultivate their lands by hired labour or by under-tenants. In this case the amount of land included in the tenure is, we think, sufficient evidence that the Tenants are not *Ryots*, and that view is supported by the light thrown on the facts by the original *Pottah*, which addresses the original Lessee as '*Moostager*,' and directs him to take measures to have the land cultivated by Hill men as *Ryots*; the land lying on the borders of the Hill ranges in the north of the *Purneah* District. We think, also, that the contention that the Tenants, from their *status* as holders of a *Jungleboory* tenure, are protected from enhancement, can also not be sustained. It has not been shown to us that *Jungleboory* Tenants have any such rights, but the Regulation which is alluded to in support of this view, viz. section 8, of Reg. VIII. of 1793, contradicts those views, and states that such tenures are liable to enhancement, or, in the words of that Regulation, to all increases imposed on the *Purgunnah* generally. The Tenants in this case being declared to be intermediate between the Proprietor and the *Ryots*, it remains, lastly, to be

considered whether they are protected from enhanced rent by sections 15 and 16, Act, No. X. of 1859. It is argued that the tenure is not permanent and is not transferable, and that the protecting clauses of those sections do not refer to any tenures except those which are both permanent and transferable, and held otherwise than under a terminable lease. On the last point we cannot say, that the present holders of the tenure hold under a terminable lease. They do not hold under the original *Pottah*, because that *Pottah* does not in any way refer to them, but only to the original Lessee. The Proprietors have allowed the present Tenants to hold the tenure without any *Pottah*, not for any short period of time, but for fifty years, ever since the decease of the original Lessee; and during that time they have in their receipts for rent and other documents designated them as *Mocurrery-dars*. And so far from the tenure not being transferable, it is clear on the face of these proceedings that the tenure has been transferred without objection on the part of the Proprietors. More than 14 *annas* of the tenure have left the hands of the descendants of the original Lessee, and been sold by public auction to new Tenants from whom the Proprietors have received rent, and whom they now sue for enhanced rent. If, then, the Proprietors have, by their acts, admitted that the tenure is transferable, and that it is *Mocurrery*, *i.e.* permanent, it is not for this Court to declare that the tenure is neither permanent nor transferable in a suit for rent, in which those questions only incidentally arise. The proper Tribunal to settle those questions is a Civil Court, not a Revenue Court, under Act, No. X. of 1859. As far as the evidence before us goes, we think that

1867.
 BABOO
 DHUNPUT
 SINGH
 v.
 GOOMAN
 SINGH.

1867.
 BABOO
 DHUNPUT
 SINGH.
 v.
 GOOMAN
 SINGH.

the Proprietors have admitted that the present tenants do hold a permanent and transferable interest in the land, and it is not shown that they hold under any lease at all, much less a terminable lease. They have not held since the Permanent Settlement. But under the law it is not necessary to show that they have held since that date. If the present tenant holds a tenure at a fixed rent which has not been changed from the time of the Permanent Settlement, that tenant is not liable to enhancement of such rent. We think that the Respondents in this case are, therefore, as far as the evidence before us goes, protected from enhancement, not as *Ryots*, but as intermediate tenants, under sections 15 and 16, Act, No. X. of 1859; and we accordingly dismiss this appeal, declaring all costs of this litigation, with interest at 12 per cent. per annum, payable by the Appellant."

The appeal to Her Majesty in Council was from this decree.

Before any steps were taken in the appeal, the Respondent, *Muddun Lall Doss*, purchased the shares of the Respondent, *Radhabutty*, in the lands above mentioned, consisting of 4 *gundahs*, 1c. 2k. 1d. sold by auction in execution of a decree of the Principal *Sudder Ameen* of *Zillah Purneah*, bearing date the 6th of *October*, 1863, and by a deed of sale, bearing date the 5th of *Maugh*, 1271 *Fusly*, the Respondent, *Biddabutty*, conveyed her share in the lands, consisting of 1a. 11g. 1k. 1d., being the last remaining portion of what had been the joint and undivided family property, to the Respondent, *Muddun Lall Doss*, in payment of a debt found to be due by her to him by the above-mentioned decree of the Principal *Sudder Ameen*.

By an Order of the High Court, *Muddun Lall Doss* was made a representative in the place of the Respondents, *Biddabutty* and *Radhabutty*.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

First, the Respondents having pleaded as the foundation of their title the *Pottah* of 1791-2, granted by the then *Zemindar* to *Aughun Singh*, they were bound by the terms of that instrument. That *Pottah* clearly created a *Jungleboory* tenure, mentioned in section 8 of *Ben. Reg. VIII.* of 1793, which is a re-enactment of the Regulation law previous to the Decennial Settlement, and, as Tenants holding under such tenure, they were liable to the enhancement of rent of the lands, at the instance of the *Zemindar*, under section 13 of Act, No. X. of 1859, such enhancement being an acknowledged incident to such a tenure. As there are no words of inheritance in the *Pottah*, such as "*Nuslun-bad-nusl*," signifying from "generation to generation," it is plainly only a lease for life, terminable at the will of the *Zemindar*. It is not *Mocurrery* or a permanent transmissible interest; but even if it was, and although held at a fixed rent, the *Pottah* was granted within twelve years before the Decennial Settlement, and the lands, therefore, are liable to an increase of assessment by the present proprietor: *Khaja Neekoos Marcar v. Ram Lochun Ghose* (a). In the note by *Macnaghten* to the case of *Dyaram v. Bhobindur Naraen* (b), he describes the difference between tenures of a *Talook* and a *Mourvosy ijareh*. He says: "The *Pottah*, or Lease, for a *Mourvosy ijareh*, does not specifically convey

1867.

 BABOO
 DHUNPUT
 SINGH
 v.
 GOOMAN
 SINGH.

(a) 3 Ben. Sud. Dew. Rep., 221.

(b) 1 Ben. Sud. Dew. Rep., 140.

1867.
 ~~~~~  
 BABOO  
 DHUNPUT  
 SINGH  
 7.  
 GOOMAN  
 SINGH.

more than an hereditary right of occupancy. If it be not *istimrari*, or entitling the Tenant to hold at a fixed rent, the amount payable to the *Zemindar* is variable." The *Pottah* being pleaded and relied on by the Respondents, the Court below was not justified in setting up and decreeing in their favour a separate and independent title, upon a presumption from their long possession of the existence of some other grant or lease not proved, which, if it existed, must have been altogether different from the *Pottah* pleaded. The Court found as a fact, that the title and possession accrued subsequent to the Permanent Settlement, it was rightly decreed that they were not protected by the terms of section 15 of Act, No. X. of 1859, from enhancement of rent. The Court below was, therefore, wrong, after such finding, in giving effect to the legal presumption that rent had been paid by the Respondents from the date of the Permanent Settlement, from the simple proof of payment of such rent for twenty years before the commencement of the suit, under section 16 of that Act.

Secondly, it is admitted by the decree appealed from, that the *Pottah* relied on was not a *Mocurrery-istimrari* lease at a fixed rent within the provisions of *Ben. Reg. VIII. of 1793, sec. 49*. That section enacts, that holders of land at a fixed rent for more than twelve years under such a title are not liable to be assessed with increase of rent by the *Zemindar*. Now, the fact of the *Pottah* creating a *Jungleboory* tenure, which gives to the *Zemindar* a continuing right to increase the rent, as new lands are brought into cultivation by the Tenant, under sec. 8, of *Ben. Reg. VIII. of 1793*, excludes the operation of sections 15 and 16 of Act, No. X. of 1859, those sections of the Act do not,



therefore, apply. The rent reserved by the terms of the *Pottah* had reference only to the rent then assessed on "the lands of the villages," which imports cultivated lands alone, not lands subsequently brought into cultivation. No assessment has ever been made, nor has any rent been reserved in respect of the Forest or jungle lands which might thereafter be cleared and brought into a productive state by the Lessee under the original *Pottah*, and no evidence was given that a fixed rent had ever been paid for the lands which were subsequently cleared and cultivated.

Mr. *W. Pearson*, Q.C., and Mr. *Stiffe Everett*,  
for the Respondent, *Muddun Lall Doss*.

Our contention is, that the *Pottah* of 1791-2 in terms points out, and must be taken to be, a *Mocurrery Pottah*, creating a permanent and transferable interest in the land, subject to a fixed rent. Now, such rent not having been changed from the time of the Permanent Settlement, the Respondents cannot be held liable to an enhancement under section 13 of Act, No. X. of 1859, having regard to the provisions of section 51 of *Ben. Reg. VIII.* of 1793, and sections 15 and 16 of the Act, No. X. of 1859. If the *Pottah* did not in terms mention a *Mocurrery-istimrary* tenure, yet the lands having been enjoyed as such at an invariable fixed rent for seventy years from the date of the Permanent Settlement, the rent cannot now be enhanced. A *Pottah*, which is defined in sec. 8 of *Ben. Reg. VIII.* of 1793, as specifying the boundaries of the land granted, conveys a freehold of inheritance, and the Court will take notice of this without evidence, because it is the common conveyance in *India : Doe*

1867.  
BABOO  
DHUNPUT  
SINGH  
v.  
GOOMAN  
SINGH.

1867.

BABOO  
DHUNPUT  
SINGH  
v.  
GOOMAN  
SINGH.

*dem Nemoo Sircar v. Watson (a). Freeman v. Fairlie (b). Gardiner v. Fell (c). In Joba Singh v. Meer Nujeeb Oollah (d), the Sudder Court decided that lands held at an invariable quit rent under a Mocurrery Pottah, for a period of upwards of twelve years, was not liable to any enhanced assessment, though the grants did not specify that the tenure was hereditary. To the same effect is Baboo Gopal Lall Thakoor v. Teluck Chunder Rai (e); Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor (f); Sheikh Emaum Buksh v. Sheikh Enayut Ali (g); Dhurpura Rain Rae v. Sreemunt Rae (h); Mussumat Brojunga Dasse v. Mussamat Debranee Dasse (i). It is clearly collected from the nature of the tenure and construction of the Pottah that it is not Jungleboory, as mentioned in sec. 8 of Ben. Reg. VIII. of 1793, as contended by the Appellant; and if it were so, these proceedings were altogether irregular, for the notice to enhance does not treat the lands as a Jungleboory tenure. The Appellant cannot set up two inconsistent titles.*

By the operation of the above Regulation and Act, a permanent and transferable interest has been created, and was in full force at the time the notice of enhancement was given, and by the Appellant's father. The permanency of the interest which the Respondents had in the lands was not questioned by the Appellant, nor by any of his predecessors in title. Though their acts and proceedings recognized the tenure as *Mocurrery*, and throughout the suit,

(a) 1 Morton's Rep., 255. (b) 1 Moore's Ind. App. Cases, 305.

(c) 1 Jac. & Wal., 22. (d) 4 Ben. Sud. Dew. Ad. Rep., 271.

(e) 10 Moore's Ind. App. Cases, 183, 191.

(f) *Ib.*, 123. (g) 7 Ben. Sud. Dew. Ad. Rep., 278.

(h) 12 Ben. Sud. Dew. Ad. Rep., 189.

(i) 1 Marshall's App. Cases, Ben., 424.



which was in fact only for enhanced rent, the Appellant never asserted or pretended any claim to recover possession of the lands. We submit, that the Appellant is estopped from denying the effects of such permanency by the acts of his predecessors in title: first, as a suit for rent admits that the possession of the tenant is rightful as *Mocurrery*; secondly, the giving receipts for rent to the tenants for the time being under the designation of *Mocurrerydars*; and thirdly, the permitting sales by public auction, as of such tenure, the Appellant himself even bidding against the Respondent, who purchased the same. It is established by the evidence, that the rent of Rs. 101 has never been advanced since the date of the *Pottah* of 1791-2, and it would be a great hardship upon the Respondent if the Appellant were allowed now to disturb the tenure. This Respondent having purchased the various shares of the descendants upon the faith of the land being held at a fixed rent of the original Lessee, which have been publicly dealt with, and sold as transferable interests, and that with the privity of the *Zemindars* for the time being, including the Appellant and his father.

Another objection is, that the Court of the Collector, a mere revenue Court under Act, No. X. of 1859, was not the proper Tribunal to determine the questions at issue in this suit, having regard to the rights and title of this Respondent, as well under *Ben. Reg.* VIII. of 1793, as under the Act, No. X. of 1859. Moreover, the notice of enhancement was not a sufficient notice, nor was it duly served; and in any event the Appellant has failed to prove that the enhancement of rent was a fair one, or such as could be enforced under the provisions of Act, No. X. of 1859.

1867.

BABOO  
DHUNPUT  
SINGH

v.  
GOOMAN  
SINGH.

1867.

BABOO  
DHUNPUT  
SINGH  
v.  
GOOMAN  
SINGH.

Sir R. Palmer, Q.C., in reply :—

Section 51 of *Ben. Reg. VIII.* of 1793, which enacts that, no *Zemindar* or other Proprietor is to increase the rent of *Talookdars* dependent on him, only applies to *Talookdars*: *Birjkishwor v. Sumbhoochund Rai* (a); *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (b). As this is a proceeding for enhancement of rent of a *Jungleboory* tenure, described in sec. 8 of *Ben. Reg. VIII.* of 1793, it is within the provisions of Act, No. X. of 1859, sections 15 and 16. *Baboo Gopal Lall Thakoor v. Teluk Chunder Rai* (c), was a suit for enhancement of rent of a *Talook* under *Ben. Reg. V.* of 1812, and this Tribunal decided that *onus* of proving that the *Talook* was held at a fixed invariable rent under a *Mocurrery* or fixed tenure twelve years before the Permanent Settlement was on the party in possession. To constitute that tenure there must be words of inheritance, such as from "generation to generation" (*Nuslun-bad-nusl*), contained in the deed (d). There is nothing of the kind to be found in this *Pottah*; there is an entire absence of the slightest indication that it was to be perpetual. It is simply a lease for life, or terminable at the will of the Landlord, as in the *Amaran*, or service tenure; *Unide Rajaha Raje Bommarauze v. Pemmasamy Vencatadry Naidoo* (e). The cases of *Freeman v. Fairlie* (f); *Gardiner v. Fell* (g); and *Doe dem Nemoo Sircar v. Watson* (h), are distinguishable, as

(a) 1 Ben. Sud. Dew. Ad. Rep., 141, and see note *ib.*, 142.

(b) 10 Moore's Ind. App. Cases, 123. (c) *Ib.*, 183.

(d) *Ib.*, 191.

(e) 7 Moore's Ind. App. Cases, 128.

(f) 1 Moore's Ind. App. Cases, 305.

(g) *Ib.*, 299.

(h) 1 Morton's Rep., 255.



the *Pottahs* in those cases were granted by the Government Collector.

Their Lordships' judgment was reserved, and now delivered by

The Right Hon. Sir RICHARD T. KINDERSLEY.

This is an appeal against a decree dismissing the suit brought by the Appellant under Act, No. X. of 1859, for the enhancement of the rent of lands within his *Zemindary*. The argument before their Lordships raised various questions of some perplexity, and of great public importance; but the facts of the case are, for those of an Indian cause, unusually free from doubt.

A claim to enhance rent assumes the existence of some right of occupation in the Defendants (the actual Tenants), and of a right to raise the rent previously paid in the Plaintiff (the *Zemindar*). The Appellant's title is thus derived:—He is the son and representative of *Baboo Pertab Singh*, who, in 1851, purchased the *Zemindary* in which the lands in question are situate at an execution sale. The execution, though at the suit of Government, was one in a mere civil suit for moneys, and, accordingly, the purchaser acquired none of the extraordinary rights of a purchaser at a sale for arrears of Government revenue. He took merely the right, title, and interest of the judgment debtor, and, therefore, subject to whatever subsisting interests in the lands had been effectually granted or created by any former *Zemindar*.

The following is the history of the Respondents' occupation:—

1867.

BABOO  
DHUNPUT  
SINGH  
v.  
GOOMAN  
SINGH.

20th Dec.,  
1867.

1867.

BABOO  
DHUNPUT  
SINGH  
v.  
GOOMAN  
SINGH.

In 1792, shortly after the Decennial Settlement of this *Zemindary* had been completed, but before that Settlement had been declared perpetual, the then *Zemindar* granted the lands in question to one *Aghum Singh*, at an annual rent of S. Rs. 101, under a *Pottah*, of which the terms and effect will hereafter be considered. *Aghum Singh* continued to pay that rent, without variation, up to the time of his death, which took place in 1820; and in some of the latest of the *Zemindar's* receipts or acquittances, which have been produced in evidence, he is described as *Mokurrereedar*. After his death his sons, *Pertab Singh* and *Neerbhan Singh*, continued to hold the lands on the same terms, and some of the *Zemindar's* receipts, accepting the same rent of S. Rs. 101 from *Pertab Singh*, and describing him as *Mokurrereedar*, are also in evidence. *Pertab Singh* died in or before 1838, for in a proceeding before the Deputy Collector of *Zillah Purneah*, dated the 24th of January, 1842, his son, *Gooman Singh*, one of the present Respondents, and *Neerbhan Singh*, are described as the then occupants of the lands.

That proceeding was in a suit brought by Government for the resumption and assignment of these lands, which failed on proof that they were included in the *Zemindary*, of which the revenue had been permanently settled in 1793, and were, therefore, not subject to any claim on the part of Government. The *Zemindar* being no party to this proceeding, it is material only as showing that the title on which the Respondents now rely was openly asserted as early as 1838. Some of the other receipts that are in evidence show that rent for the years 1835, 1836, and 1837, at the old rate of S. Rs. 101, was received



1867.  
 BABOO  
 DHUNPUT  
 SINGH  
 v.  
 GOOMAN  
 SINGH.

from *Gooman Singh*; and in these also he is described as *Mocurrereedar*. It is not, however, clear that these last-mentioned receipts were granted by the then *Zemindar* or his Officers. It seems more probable that they were granted by a Receiver, who, under the Court of Wards, during the minority or incapacity of the *Zemindar*, or under some other unexplained circumstances, was at that time in possession of the *Zemindary*. It also appears that although the rent was often taken from one member of the *Singh* family, as shown by the receipts, there were many persons of that family beneficially interested in the lands, *Pertab Singh* having left five sons besides *Gooman Singh*, and *Neerbhan Singh* having on his death left two sons, *Dabee Singh* and *Akbar Singh*. And from one of the documents in evidence in the cause it appears that fees were paid by the two last-named persons to, and accepted by, the Receiver in 1845, on a mutation of names, as upon the devolution of a *Mocurrery* tenure.

The Father also of the Appellant is shown to have brought, in 1855, a summary suit for the recovery of one year's rent, at the rate of S. Rs. 101, alleging that the lands were held as a *Mocurrery* at that rent by the Defendants there named.

So far the tenure, whatever was its nature, remained in the *Singh* family, but it afterwards became the subject of transfer by sale. By various transactions, partly of voluntary sale and purchase, partly of purchase at judicial sales, of which the earliest is in 1858, the Respondent, *Muddun Lall Doss*, had, before the commencement of the present suit, acquired the whole interest in the tenure, except the shares (at most one-twelfth each) of *Gooman Singh* and of

1867.

BABOO  
DHUNPUT  
SINGH  
v.  
GOOMAN  
SINGH.

one of his brothers; and it is stated in the Respondents' case that he has since acquired the last-mentioned shares also, and is now the only person interested in supporting the decree under appeal. The result, therefore, of what has been stated is, that at the commencement of this suit the lands had been held as against the *Zemindar* at one unvarying rent since 1792, under a tenure originating in the *Pottah* of that year, but treated *de facto* as an hereditary tenure, and, from time to time, described by both the *Zemindar* and the tenants as a *Mocurrery* tenure; and that, as such, it has been made the subject of sale and transfer, to the knowledge and with the assent of the *Zemindar*, who on one occasion bid, through his manager, for a portion of it.

The first proceeding in the suit was necessarily the notice which the 13th section of the Act directs to be served on the under-tenant or *Ryot* whose rent is sought to be enhanced. That document stated that the *taisdad*, meaning probably the rent-roll, of the lands was extremely small; that the Respondents had produced "no reliable document," showing on what special grounds they occupied them; that with a view to settle the rent, the lands had been measured, and were found to consist of 11,645 *bee-gahs*; and that the rent of them, according to the rate paid by other *Ryots* cultivating the same kind of land, would amount to Rs. 24,842. 10a. 8p. And the plaint founded on this notice accordingly claimed that sum with interest, amounting in all to Rs. 26,752. 6a. 9p. as due from the Respondents to the Appellant.

The learned Counsel for the Appellant have argued, that the defence set up by the Respondents



must be taken to be that they are the holders of a *Mocurrery-istimrary* tenure, *i.e.* an hereditary tenure, at a fixed rent under the *Pottah* of 1792; and that they must stand or fall, according as the terms of that instrument establish, or fail to establish, such a title. Their Lordships cannot accede to that argument. It is to be observed, that Act, No. X. of 1859, sec. 59, does not require the Defendants to put in any written pleading. And, in their Lordships' opinion, the fair construction of the written statement which, under the option given to him, the Respondent, *Muddun Lall Doss*, did put in is, that under all the circumstances stated above, he and those from whom he derives title must be taken to have held as hereditary *Mocurrereedars*, which of itself would be an answer to the suit; and that if that contention could not be supported to its full extent, they were protected against an enhancement of rent by the provisions of Act, No. X. of 1859.

The Respondents have been successful in every stage of the suit in the Courts below; but the several decisions in their favour have proceeded on different grounds. The Collector (the Judge in the first instance), in his judgment of the 31st of *March*, 1862, seems to have held, that though the *Pottah* neither stated the amount of the land, nor said that it was to be held for ever at the rate fixed, the Defendants had proved that they had held for upwards of seventy years at one rate, and that the Plaintiff had totally failed to prove that his proposed enhancement was a fair one, or at a rate which could be enforced under the Act. From this there was an appeal to the High Court. The petition of appeal treats the Respondents as *Ryots*; and on the first argument in

1867.  
 BABOO  
 DHUNPUT  
 SINGH  
 v.  
 GOOMAN  
 SINGH.

1867.  
BABOO  
DHUNPUT  
SINGH.  
v.  
GOOMAN  
SINGH.

that Court their Counsel argued their case on the assumption that they were properly described as *Ryots*. On that occasion the Judges held that the *Pottah* did not in its terms confer any *Mocurrery* title; and that the statement of the Appellant's father, and the receipts describing the tenants as *Mocurrereedars*, would not, in the absence of all *Mocurrery* title in the original lease, confer such a title, or form an estoppel to the Appellant's suit. But they also held that the law, as declared by the 3rd and 4th sections of Act, No. X. of 1859, conferred in fact a *Mocurrery* title on all *Ryots* in the position of the Defendants, who held lands at fixed rents, which had not been changed since the date of the Permanent Settlement. The Appellant petitioned for a review of this decision, partly on the ground afterwards decided against him, and now abandoned, as to what in legal contemplation is the date of the Permanent Settlement; and partly on the ground that the Court had proceeded upon the provisions of the 3rd and 4th sections of the Act, No. X. of 1859, which were specifically applicable to *Ryots* only, whereas it ought to have proceeded under the 15th and 16th sections, relating to persons possessing a transferable interest in the land intermediate between the Proprietor of the estate and the *Ryots*, such as the Defendants were; that between these last-mentioned sections, on the one hand, and the 3rd and 4th sections on the other, the right may be dependent on the conditions of a lease, whereas under the latter it would be independent of the conditions of any lease; and finally, that the question was to be treated not as one of prescriptive right, but as one dependent on the terms of the *Pottah*. The High



Court, on this final hearing, held that the Defendants were not *Ryots*, but Tenants intermediate between the Proprietors and the *Ryots*; that they did not hold under a terminable lease, nor under the *Pottah*, which did not in any way refer to them, but only to the original Lessee; but that inasmuch as they had been allowed by the Proprietors to hold the tenure without any *Pottah* for fifty years, and ever since the death of the first Lessee, and the Proprietors had by their acts admitted the tenure to be transferable and *Mocurrery*, i.e. permanent, it was not for the Court, sitting as a Revenue Court under Act, No. X. of 1859, and in a suit for rent, to declare the tenure neither permanent nor transferable; and that the Respondents, holding a tenure at a fixed rent, which had not been changed from the time of the Perpetual Settlement, were protected by the 15th and 16th sections of the Act from enhancement.

It is now assumed on both sides that whatever was the interest of the Respondents in these lands, they were not *Ryots*, but Tenants intermediate between the Proprietor and the *Ryots*. And one of the points taken for the first time here was, that that being so, they were not subject to the jurisdiction of the Collector under Act, No. X. of 1859; that this tenure, if it could be made the subject of enhancement of rent at all could be made so only by suit in the Civil Court; and for examples of this we were referred to the cases of *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123); and that of *Baboo Gopal Lall Thakoor v. Teluk Chunder Roi* (10 Moore's Ind. App. Cases, 183).

Their Lordships cannot entertain any doubt of the

1867.  
 BABOO  
 DHUNPUT  
 SINGH  
 v.  
 GOOMAN  
 SINGH.

1867.

BABOO  
DHUNPUT  
SINGH  
v.  
GOOMAN  
SINGH.

jurisdiction of the Courts below. Both the cases cited were tried before Act, No. X. of 1859, was passed. That Act throughout contemplates under-tenants as distinct from *Ryots*, and contains provisions relating to both classes. And their Lordships think that the 23rd section of the Act, by which exclusive jurisdiction is given to the Collector over the suits therein mentioned, embraces such a suit as this, whether it be treated as what it substantially is, viz. "a suit for the determination of the rate of rent at which a *Pottah* and *Kaboolyat* should be given," or as what it is in form, a suit for "arrears of rent due on account of land."

This being so, the first question is, what is the nature of the Respondents' sub-tenure? If it can be shown to be *Mocurrery-istimrary*, there is an end of the case. If this cannot be established, the question whether the Respondents are not protected by the 15th and 16th sections of the Act will arise.

The *Pottah* is addressed to *Aghum Singh* as "*Moostager*," which is translated "*Farmer*" of *Mou-zah Cheloone*, and other villages in Forests of *Suk-hooa* trees in the *Zillah* named; and the operative part of it, according to one version of it, is in these words: "Inasmuch as, in accordance with your application, the lands of the villages in the said Forests have been assessed with a rental of 101 rupees, everything being consolidated, and a *Pottah* granted to you, it is required that you will in all confidence have the lands of the said Forests occupied by *Purbutteas* and other *Ryots*, and keep paying to the *Sircar* the rent year by year, according to this *Pottah*; and whenever you may be summoned



for the purpose of hunting, you will attend accompanied by all the *Purbutteas*."

In the course of the arguments for the Appellant, a question was raised whether this *Pottah* was more than a lease of the village lands then in cultivation; and whether the greater part of the land now in the occupation of the Respondents had not been acquired by subsequent and gradual encroachment. Their Lordships, however, are of opinion, that the *Pottah* covered, not only the lands then in cultivation, but also the Forest lands which the grantee was to settle and reclaim by bringing *Purbutteas* and other *Ryots* upon them; and upon the pleadings and evidence in this cause, they must assume that it included all the lands which the Appellant now seeks to re-assess. The nature and extent of the interest in these lands which it conferred on *Aghum Singh* have now to be considered.

Upon these points their Lordships are not prepared to dissent from the judgment of the High Court, in so far as it found that the *Pottah*, taken by itself, cannot be held to have granted a *Mocurrery-istimrary* tenure. It does not contain the term "*Mocurrery*," or any equivalent words from which an obligation on the part of the Grantor never to raise the rent is fairly to be inferred; nor does it contain the expression "from generation to generation," or other like words importing that tenure, whether the rent was to be fixed or variable, was to be hereditary. Their Lordships cannot accede to the argument for the Respondents, that a *Pottah* must *primâ facie* be assumed to give an hereditary interest, though it contains no words of inheritance. They do not think that the case cited from *Morton's* decisions, still less that

1867.

BABOO  
DHUNPUT  
SINGHv.  
GOOMAN  
SINGH.

1867.

BABOO  
DHUNPUT  
SINGH  
v.  
GOOMAN  
SINGH.

that of *Freeman v. Fairlie* is any authority for such a proposition. "*Pottah*," as may be seen by referring only to Act, No. X. of 1859, is a generic term which embraces every kind of engagement between a *Zemindar* and his under-tenants, or *Ryots*. Nor can it be disputed that the expressions here wanting are ordinarily used in the grant of a perpetual tenure.

Again, neither the date nor the nature of the transaction is, on the whole, in favour of the hypothesis that the intention of the Grantor was to create a perpetual tenure at a fixed rent. It may be conceded to the Respondents that the *Zemindar* in 1791 may have deemed himself capable of granting such a tenure. For, though according to the preamble of *Ben. Reg. XLIV.*, of 1791, *Zemindars*, before the Perpetual Settlement, had no power to enter into engagements for a period exceeding that of their own engagement with Government, and in 1792 the Decennial Settlement, which had just been completed, had not been declared perpetual, yet at that time there was every reason to believe that the settlement would be declared perpetual; and the second section of the Regulation last referred to, which restricts the *Zemindar's* power of disposition, had not been enacted. The whole policy, however, of the Decennial Settlement, as appears by Regulation VIII. of 1793, was adverse to *Mocurrury* tenures. It made them all subject to re-assessment, unless they fell within the protection of the 49th section of that Regulation. It is, therefore, not probable that the *Zemindar* would, immediately after the completion of the settlement, grant such a tenure, except upon special grounds and adequate consideration; and of these there is no proof. Though the *Pottah* contains



some reference to future services, as incidental to the tenure, the transaction on the face of it is a grant of lands partly cultivated but chiefly waste, with the object, on the part of the Grantee, of bringing the latter into cultivation.

1867.  
BABOO  
DHUNPUT  
SINGH  
v.  
GOOMAN  
SINGH.

If, on the one hand, it is improbable that the Grantee should undertake such an obligation without some fixity of tenure, and some assured and permanent interest in the lands; it is, on the other hand, equally improbable that the Grantor should part for ever with all his interest in the improvable value of his lands. But passing from the *Pottah*, taken by itself, it is necessary to consider the character of the occupation of the land, as shown by the uncontested facts of the case.

The Appellant, as we have already remarked, is not, as was the Plaintiff in the case of *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 183), which was cited in the argument, an auction Purchaser, who, under the Revenue laws, can throw upon the Tenant the burden of showing that his tenure would have been valid against a *Zemindar*, unfettered by any personal engagement, at the time of the Perpetual Settlement. He is bound by the engagements and acts of his predecessors in the *Zemindary*; and we must consider the evidence of these as it bears first upon the duration of the tenure, and next upon the question of fixed or variable rent. And, in doing this, we must recollect that, after the passing of Regulation V. of 1812, there was no restriction upon the disposing power of the *Zemindar*.

The facts already stated, afford incontestable proof that ever since the death of *Aghum Singh*, the here-

1867.  
 BABOO  
 DHUNPUT  
 SINGH  
 v.  
 GOOMAN  
 SINGH.

ditary character of this sub-tenure has been recognized by the successive *Zemindars*. There is also evidence, which is not contradicted, that some of them have recognized its transferable nature. This evidence affords ample grounds for inferring either that the tenure was always intended to be hereditary, although not so expressed in the *Pottah*, or that, if the original grant were limited, as was suggested, to the life of *Aghum Singh*, his tenure has by some subsequent grant become hereditary and transferable. And, upon the proof here given of long and uninterrupted enjoyment, accompanied by the recognition of its hereditary and transferable character, it is almost impossible to suppose that a suit by the *Zemindar* in the Civil Court to disturb the possession of the Respondent, could not be successfully resisted. The case of *Joba Singh v. Meer Nujeeb Oollah* (4 Ben. Sud. Dew. Ad. Rep. 271) is an authority for the proposition, that evidence of this kind will supply the want of the words "from generation to generation" in the *Pottah*, which is the foundation of such a title.\*

Upon this second point, the evidence of the subsequent acts and conduct of the *Zemindars* is material only in so far as the receipts and proceedings above referred to show that both *Aghum Singh* and his successors were described as *Mocurrereedars*. Their Lordships are not prepared to say that, from this evidence, a Court or jury might not legitimately infer, as against the first *Zemindar* and his successors, either that the rent had been always fixed, or that by subsequent contract, that, which had been originally variable had been made invariable. It is not, however, necessary for the determination of this appeal that they should so decide; and they are unwilling,



without necessity, to draw from the facts proved conclusions which were not drawn by the Court below.

It is sufficient to say, that if the tenure was or has become hereditary and transferable, as stated above, and if, as is abundantly shown, the rent has not been changed from the time of the Perpetual Settlement, the case, as ruled by the High Court, falls within the protection of the 15th section of Act, No. X. of 1859. Whatever be the interpretation to be given to the somewhat loose and ambiguous expression, "a terminable lease," it is clear that a tenure under which the Tenant can no longer be dispossessed by his superior cannot be brought within that exception.

There is another ground upon which, though it does not seem to have occurred to the Court below, their Lordships cannot but think that the present suit ought to have been dismissed. It has been seen that the Respondents were sued as occupying *Ryots*, liable for the rent assessed upon them in that character; that the High Court held that, considered as *Ryots*, they were protected by the 3rd and 4th sections of the Act, No. X. of 1859, and that thereupon the Appellant, shifting his ground and treating the Respondents not as *Ryots*, but as Tenants intermediate between him and the *Ryots*, obtained an Order for review.

But if the Respondents were Tenants intermediate between the Proprietor and the *Ryot*, that fact seems to raise objections both of form and of substance fatal to the maintenance of the present suit. The notice on which it was founded did not in that case accurately specify "the ground on which enhancement of rent was desired;" and the assessment on which the sum sued for was calculated, was improperly made:

1867.

BABOO  
DHUNPUT  
SINGHv.  
GOOMAN  
SINGH.

1867.

BABOO  
DHUNPUT  
SINGH7.  
GOOMAN  
SINGH.

the case of *Dyaram v. Bhobindur Naraen* (1 *Ben. Sud. Dew. Ad. Rep.*, 139), and the note of Sir *William Macnaghten* at the foot of it, p. 140, show that, where the suit is against an intermediate Tenant, the enhancement ought to be made according to the *Pergunnah* rate of the rents payable, not by *Ryots*, but by the holders of similar tenures. To assess such an intermediate Tenant according to the rents paid by *Ryots*, must necessarily deprive him of all beneficial interest in his tenure.

Their Lordships, however, do not decide this case on this last ground. For the reasons above stated, they think that the decision of the High Court was substantially right, and they will humbly recommend Her Majesty to dismiss this appeal with costs.

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MOHUMMUD ZAHoor ALI KHAN ... *Appellant*;

AND

MUSSUMAT THAKOORANEE RUTTA }  
KOER, and others ... } *Respondents.\**

*On appeal from the Sudder Dewanny Adawlut,  
North-Western Provinces, Agra.*

2nd Dec.,  
1867.

To entitle a female disqualified landholder, whose estate is in charge of the Court of Wards, to take advantage, by way of defence

THE suit in which this appeal arose, was brought by the Appellant against the Respondents in the Civil Court of the Principal *Sudder Ameen* of

Present:—Members of the *Judicial Committee*—The Right Hon. Sir James W. Colvile, the Right Hon. Sir Edward Vaughan Williams, the Right Hon. Sir Richard Torin Kindersley, and the Right Hon. the Lord Justice Rolt.

Assessor:—The Right Hon. Sir Lawrence Peel.

to an action brought against her, of the provisions of *Ben. Reg.*, LII. of 1803, in respect of her non-liability for Bond debts contracted by her, the course pointed out in that Regulation must be strictly followed.



*Zillah Meerut*, to recover the sum of Rs. 21,280, principal and interest, due on a Bond alleged to have been executed by the first Respondent. The other Respondents were made Defendants on the allegation that they had combined with the Obligor and colorably procured her estate to be transferred to them in order to deprive the Appellant of his remedy against it.

1867.  
 MOHUMMUD  
 ZAHOR  
 ALI KHAN  
 v.  
 MUSSUMAT  
 THAKOO-  
 RANEE  
 RUTTA KOER.

The *Sudder Ameen* (*Mohammed Abdool Azeez Khan*) dismissed the suit, with costs, on the ground that *Talooka Chukkathul*, in the Collectorate of *Allygurh*, the estate of the first Respondent, *Rutta Koer*, was, at the date of the execution of the Bond in question, in charge of the Court of Wards, under *Ben. Reg.*, LII. of 1803, and that it was, therefore, essential that the Government's Collector's sanction should have been obtained to the execution of the Bond, and he held that such omission nullified the Bond; and, further, that in consequence, it became unnecessary to record any opinion as to the genuineness of the Bond, or to enter into any of the other points stated in the recorded issues. By the

The provisions of *Ben. Reg.*, LII. of 1803 (extending *Ben. Reg.*, X. of 1793, to the North-Western Provinces), are identical with the former Regulation.

Circumstances in which it was held, that a female whose estate was under the control of the Court of Wards was not to be considered a disqualified female, and that she had power to contract Bond debts.

Where a Plaintiff sued the Obligor and other Defendants on a Bond, not affecting land, and there was an allegation in the plaint, that the Obligor had transferred the land to those Defendants to avoid judgments attaching on the land, it was held, that there was no right of action against those Defendants, and they were improperly made parties.

The case of *Jan Khatoon v. Khwaja Ali Mullah* (5 *Ben. Sud. Dew. Ad. Rep.*, 240), founded upon *Ben. Reg.*, X. of 1793, followed.

Although the Judicial Committee is disposed to give a liberal construction to pleadings in Indian Courts, so as to allow every question to be raised and discussed in the suit, yet a Plaintiff cannot be entitled to relief upon facts and documents neither stated or referred to in the pleadings.

1867.  
 MOHUMMUD  
 ZAHOR  
 ALI KHAN  
 v.  
 MUSSUMAT  
 THAKOO-  
 RANEE  
 RUTTA KOER.

decree of the late *Sudder Dewanny* Court at *Agra*, consisting of Messrs. *J. H. Batten* and *C. R. Lindsay*, the decision of the lower Court was affirmed, as the appellate Court was of opinion, that the superintendence of the Court of Wards over the estate existed at the time of the execution of the Bond, and as a conclusion of law, the first Respondent was not competent to incur any debt, and, therefore, decreed that, in the circumstances, there was no necessity for inquiring into the second issue, namely, whether the Bond was executed by her and was a *bonâ fide* instrument.

The present appeal was from this decree of affirmance. As the Respondents did not appear, the case was heard *ex parte*.

The judgment of their Lordships being confined to the operation of *Ben. Reg.*, LII. of 1803, and not touching the merits, it is not necessary to detail the facts.

The questions taken on appeal were ; first, whether the estate and property of the first Respondent, *Rutta Koer*, was in charge of the Court of Wards when the Bond sued upon was alleged to have been executed by her ; and secondly, whether such custody or charge was not of a character as, under the above Regulation, incapacitated her from contracting debts in any way, without the consent of the Court of Wards, and deprived the Appellant of his rights under the Bond.

Mr. *Leith* (Sir *R. Palmer*, Q. C., with him), for the Appellant,

Submitted, that the Respondents failed to prove that at and previously to the date of the execution of



the Bond sued on by the Appellant, the Respondent, *Rutta Koer*, had been by the Revenue authorities formally found to be a disqualified landowner and incompetent to the management of her estate, and that by reason thereof her estate had been taken possession of and placed under a Manager by the Court of Wards, under *Ben. Reg.*, LII. of 1803, and urged that, on the contrary, it was established by the Appellant's evidence, that the *Sudder* Board of Revenue, who afterwards acted in the capacity of the Court of Wards, did in fact consider the first Respondent as exempted from the operation of the above Regulation, and invested her with the management of her estates. That being competent to charge the estate, she executed by their order, the same directions for the payment of the Government revenue as other qualified proprietors, under the provisions of *Ben. Reg.*, VIII. of 1805, sec. 29, and he further urged that, assuming that she could have been considered as a disqualified landholder, and her estate under the charge and management of the Court of Wards, at the date of the execution of the Bond; yet as such disqualification did not arise from minority, idiotcy, or mental imbecility, the first Respondent was not thereby legally incapacitated from contracting debts for her necessary expenses, or executing a Bond for securing repayment thereof.

Their Lordships reserved judgment, which was now pronounced, as follows, by

The Right Hon. Sir JAMES W. COLVILE.

This is an appeal from a decree of the late *Sudder Dewanny Adawlut*, of the *North-Western* Provinces of *Agra*, bearing date the 11th of *July*, 1864, which

1867.

MOHUMMUD  
ZAHoor  
ALI KHAN  
v.  
MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

10th Feb.,  
1868.

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN

v.

MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

affirmed a decree of the Principal *Sudder Ameen* of *Meerut*, bearing date the 25th of *February*, 1863.

The plaint was filed in the Court of the Principal *Sudder Ameen* of *Allygurh* on the 3rd of *May*, 1861, and is entitled, the petition of plaint of the Plaintiff against *Rutta Koer* and nine other persons, there named, and against *Zemindary* rights in certain *Mouzahs*, there named, the property of *Rutta Koer*; and claimed to recover Rs. 21,280, the amount due on a Bond, dated the 19th of *August*, 1856, and stated that, *Rutta Koer* borrowed from the Plaintiff Rs. 10,000, and executed a Bond engaging to pay the amount on demand with interest at 2 per cent. *per mensem*; and that the Plaintiff had repeatedly demanded the amount due, but that *Rutta Koer* evaded payment, and had not discharged the debt. It further stated, that in order that the money might be lost to the Plaintiff the other Defendants had combined, and got the above estates belonging to *Rutta Koer* illegally transferred to them, though they had not been put in possession; and, therefore, as a precautionary measure, the Plaintiff filed the petition of plaint, with the Bond on which his suit was based, against *Rutta Roer*, the principal Defendant, and the other Defendants who claimed her property; and it concluded by praying, that the amount sued for might be decreed against the Defendants, and the property aforesaid, with interest to the date of realization.

The Bond of the 19th of *August*, 1856, filed with the plaint, and on which, as stated in the plaint, the suit is based, is a simple money Bond, purporting to have been executed by *Rutta Koer* for Rs. 10,000, and interest. None of the other Defendants are in any way parties to it, nor does it purport to be a



mortgage or charge upon, or in any way to refer to the property mentioned in the plaint.

The Plaintiff has also tendered in evidence another Bond, dated the 28th of *November*, 1857, by which *Rutta Koer* purports to secure a further advance, and to pledge her *Zemindary* estates to the Plaintiff until she should pay off the whole debt to him. But his suit is in no way based upon this second Bond.

Now, as to all the Defendants, except *Rutta Koer*, it is obvious on the face of the plaint that no relevant case is made against them. The allegation that they have combined with the Plaintiff's alleged Debtor to get her estates illegally transferred to them, is no ground of suit against them, if, as is the case here, the Plaintiff sues upon an instrument which creates no charge upon or estate or interest of any kind in the lands. If he can obtain judgment on his Bond, and is not satisfied, he may possibly be entitled hereafter to raise such a case, as that suggested in the plaint, against the land and against these Defendants; but any such proceedings before execution on the judgment are premature. It follows, therefore, that as against these Defendants, at all events, the appeal must be dismissed, and it is wholly unnecessary to consider as to them the other defences set up in their several written statements.

Nor as to *Rutta Koer* was it open to the Plaintiff on this plaint, to ask for any decree other than a personal decree for payment of the amount due on the Bond. The Plaintiff is not entitled to rely on his second Bond. Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised

1857.

MOHUMMUD  
ZAHOR  
ALI KHAN

7.  
MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN  
v.  
MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

and discussed in the suit, yet this liberality of construction must have some limit. A Plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings, and the only thing that can be rightly insisted on by the Plaintiff here is a decree for payment against *Rutta Koer*. To a decree so limited, he would be entitled in a suit properly framed, if he proved his case; and the only defences that could usefully be raised by *Rutta Koer* are—that she was incompetent to contract debt—or that she did not in fact contract debt—or that she had satisfied it.

Two of these defences she has in fact pleaded; namely, first (in substance and effect), that no such money was ever lent her, and that the Bond was fabricated; and, secondly, that her property was under the Court of Wards, and that the Government Officials had not been made cognizant of or accorded their sanction to the institution of the suit, and that, even supposing the Bond to be genuine, the claim of the Plaintiff could not lie against the person and property of the Defendant.

Amongst the issues fixed for trial by the Principal *Sudder Ameen* (besides those relating to the validity of the Bond and the existence of the debt) was one in the following terms:—"Thirdly, had the Defendant the power to contract debts, her estates being under charge of the Court of Wards; and is the fact of no notice having been given of the execution of the Bond and the contracting of the debts at the Collectorate a sufficient argument for the falsity of the Bond or not?"

The form of the issue apparently assumes that *Rutta Koer's* estates were under charge of the



Court of Wards, and that the only question was the effect of this circumstance on her power of contracting debts; but it will be observed that the question is, "Had the Defendant the power to contract debts?" and not the more limited question, whether she had power by contract to charge her land with debts.

It is further to be observed that, though the third issue appears to assume that the Defendant's estates were under the charge of the Court of Wards, yet the fact of their being, or of their having been under charge, was the only fact or point treated as open to dispute or question in the Courts below. It was assumed by both the Courts that, if her estates were in charge the case was at an end—the Plaintiff could have no relief of any kind; and both Courts being of opinion, that there was sufficient proof of the estates having been in the custody of the Court of Wards, from a time anterior to the date of the Bond to a time subsequent to the institution of the suit, the Plaintiff's suit was dismissed with costs, and there was no examination of, or observations upon the evidence, which the Plaintiff had tendered of the loan of the money to *Rutta Koer*, and the execution by her of the Bond.

Under these circumstances, the principal questions to be considered on this appeal are, whether the estate and property of *Rutta Koer* were in fact under the charge of the Court of Wards when the Bond is alleged to have been executed, and if so, whether such custody or charge was of a character which made her what is called, under the Regulation to be presently referred to, a disqualified female, and incapacitated her to contract debt in any way.

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN

v.  
MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN  
v.  
MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

These questions turn mainly on Regulation LII. of 1803. That Regulation, after reciting that it is essential to the interest and happiness of Minors, and of such Females as shall not be deemed competent to the management of their own estates, and of Idiots, Lunatics, and other proprietors of land paying revenue to Government, who are or may be rendered incapable of managing their lands by natural defects or infirmities of whatever nature, that the lands of persons coming within the above descriptions, should be managed for the benefit of the Proprietors, by persons appointed to the trust by Government, and that a Court of Wards should be instituted, with powers to superintend the conduct and inspect the accounts of the Managers of the estates of such persons, it was enacted by section 5, that the superintendence of the Court of Wards should extend to the persons and estates of (amongst other persons) all proprietors of entire estates paying revenue immediately to Government, who were or might be Females not deemed by the Governor-General in Council competent to the management of their own estates. Section 6 enacts, that the lands of disqualified landholders should not be liable to be sold for arrears of public revenue on account of the periods during which such lands might be under the charge of the Court of Wards. Section 8, that the Collectors of the revenue should ascertain and report to the Board of Revenue what proprietors were disqualified. Section 9, that if a proprietor of lands were disqualified solely from being a Female, the Court was to take charge of the estate and to report to the Governor-General, with power to the Governor-General to declare her exempt from the Regulation. Section 10, that Managers



and Guardians were to be distinct, and Managers to have care of estates, real and personal; and by sections 22 and 23 provision was made for the application of moneys received of Managers, in which there was a provision that any just debts then outstanding against, or thereafter adjudged against the estates of disqualified landholders, must necessarily be satisfied; but that the circumstances of all such debts were to be reported to the Collector, and by him to the Court of Wards, previous to payment by the Manager; and by section 26, Females, though disqualified, were not to be subjected to Guardians, but might themselves receive and disburse their own maintenance.

There is no pretence for saying that, but for the application of this Regulation to her, *Rutta Koer* was incapable of contracting the debt in question. The Regulation itself does not in terms declare the incapacity, or define the circumstances in which it is to arise. The provisions of such a law should be strictly pursued, in order to effect the disqualification of any particular person; and no one should lose her natural liberty of contracting debts unless the relation of Ward and Guardian between her and the Court of Wards be regularly and completely constituted.

The examination, however, of the evidence in the Court below appears to have been addressed solely to the object of discerning whether the *Talook* was, in fact, under charge; and it seems to have been assumed, that if in charge, *Rutta Koer* was a disqualified person. But their Lordships are of opinion, that this does not necessarily follow; the Court of Wards may have obtained the custody originally under circumstances not affecting her personally, and may have continued in charge after the estate

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN  
v.  
MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN  
v.  
MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

devolved upon her under circumstances which do not necessarily make her a disqualified Female under Regulation LII. of 1803. It becomes, therefore, material to ascertain, not merely, whether the estate was under charge, but also what were the circumstances under which it was first brought under charge, and afterwards so continued.

The material facts are these. The landed property in question of *Rutta Koer* (usually called throughout these proceedings the *Talooka Chukkathul*, in the Collectorate of *Allygurh*) had previously belonged to her Sister, *Maha Koer*. She was declared a disqualified Female, under Regulation LII. of 1803, as far back as the year 1811, and the *Talook* was then placed under the Court of Wards, and a Manager was appointed under that Regulation; but in 1838, in lieu of continuing it in the hands of a Manager, the *Talook* was let to Farmers, who paid their rents to the Collector, who exercises the powers of the Court of Wards, and throughout the whole period from 1811 until *Maha Koer's* death (with the exception of a few years arising from circumstances not material to the question) the *Malikana*, or maintenance, was paid by the Collector to *Maha Koer*.

*Maha Koer* died in 1853. On her death adverse claims were set up to the property; one by *Aram Singh*, claiming as heir of her deceased husband; another by one *Ali Buksh*, claiming under a Deed from her; and the third by *Rutta Koer* claiming as her Sister and heir. The claim of *Ali Buksh* appears to have been first disposed of, and was found to be groundless. As between *Aram Singh* and *Rutta Koer* the Government, through the *Sudder Board* of Revenue, appears to have decided in favour of



*Rutta Koer*, whose name was recorded as proprietor of the *Talook* in place of the deceased *Maha Koer*; but she was not put into possession. About this time, and apparently in consequence of the decision of the *Sudder Board*, and certainly in or before the year 1855, a civil suit was instituted by *Aram Singh* in the Court of the Principal *Sudder Ameen* of *Allygurh*, to enforce his claim against *Rutta Koer*, and to this suit he made the Government a party, on the ground of the estate being under the control of the Court of Wards. Thereupon the official correspondence of the Collector took place. This mentions that in *August*, 1855, a petition was filed by *Rutta Koer* in the Court of the *Allygurh* Collector, stating "that she was not subject to the Court of Wards; that Government had been wrongly made Defendant; also that she had succeeded by inheritance to the property of her deceased Sister, *Mussumat Maha Koer*, who was subject to the Court of Wards; that the functions of the Court had ceased with the Ward's demise; and that the Board, in paragraph 16 of their Orders, No. 83, dated the 6th of *February*, 1855, had ruled that, in the absence of any other rightful Claimant, the *Malguzary* management must depend upon her discretion;" and from this correspondence it appears, that the final determination of the Government was to put in an answer to the effect, that Government was not interested in the suit, that the question of right should be settled between the contending parties themselves, and that Government should be exempted from all costs. This was done, the litigation went on between *Aram Singh* and *Rutta Koer*; a decree was made in favour of the latter by the Principal *Sudder Ameen*, the date whereof does not appear in the proceedings; there was an appeal

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN

v.

MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

1867.

MOHUMMUD  
ZAHOOOR  
ALI KHAN  
v.  
MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

from that to the *Sudder* Court, where the suit finally ended in a compromise some time in or before the year 1862. If the evidence stopped here, it would be impossible to hold that the continued possession of the Court of Wards was more than that of a Stakeholder ; since if it really held the *Talook* as a Court of Wards on behalf of *Rutta Koer*, treating her as a disqualified Proprietor, it was clearly the duty of the Collector representing the Court of Wards actively to defend her title to the estate. It appears, however, that the Revenue authorities have not acted consistently on their then view of the case ; for in *February*, 1856, *Rutta Koer* being recorded as Proprietor, a mutation of names as to several villages in the *Talook* was applied for on behalf of certain persons, including the present Appellant, who claimed under assignments from her ; and this application having been disallowed by the Collector, because a civil suit was pending, and it was difficult to say who was in possession, the *Sudder* Board confirming, on appeal, the Collector's decision, declared that *Chuk-kathul* never had been emancipated from the control of the Court of Wards, and had never been given into the possession of *Rutta Koer*.

In 1856 the Farmers set up claims to a settlement adverse to the proprietary title of *Kutta Koer* in *Chuk-kathul*. Their claim was disallowed, and thereupon a correspondence between the Government authorities took place, in the course of which the Secretary to Government, in a Letter, dated the 21st of *August*, 1856, stated that the Lieutenant-Governor agreed in opinion with the *Sudder* Board that no claim adverse to the proprietary title of *Thakooranee Rutta Koer* existed, nor had any sprung up during the



administration of the Court of Wards, and that he authorized the acceptance of proprietary engagements from the *Thakooranee*, with certain terms of settlement in favour of the *Theekadars*, or Farmers. And, it appears from the judgment of the *Sudder Dewanny Adawlut*, though the document itself is not set forth in the Record, that a Proclamation, dated the 1st of *October*, 1856, issued from the Collector's Office, in conformity to the orders of Government and the Board, giving full proprietary possession to *Rutta Koer*, who had filed the usual *Durkhast*, or petition, asking to engage for the payment of revenue, and that the *Putwarry* of the *Talook* acknowledged receipt of the Proclamation and the possession of *Rutta Koer* on the 13th of *October*, 1856. This arrangement, however, was not finally carried out. It appears from the Letter of the Collector of the 18th of *September*, 1858, that before the contemplated settlement was completed the Mutiny broke out. He says: "Then happened the Mutiny, with the Farmers still in possession of the Villages, and the Government orders for giving possession to *Rutta Koer* not carried out." From the same document it appears that, in *October*, 1857, when order was restored to the District, he, as Collector, resumed charge of the *Talook*, of which, on the 2nd of *March*, 1858, he appointed a Manager; and, there is further proof that, between the last-mentioned date and *April*, 1862, the *Talook* was under the management of the Court of Wards. But in or before the month of *August*, 1862, the Court of Wards, for some unexplained reason, gave up the possession and management of the property, as appears from the *Perwannah* of the Collector filed in this suit, which is referred

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN

v.

MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN

7.

MUSSUMAT  
THAKOO.  
RANEE  
RUTTA KOER.

to by the Principal *Sudder Ameen*, in his proceeding fixing the issues.

Their Lordships are of opinion, that the Courts below were warranted in concluding from this evidence that, with the exception perhaps of the period during which all order and government may have been suspended in this District by the Mutiny, the Court of Wards was continuously in the actual possession of this *Talook* from the year 1811 to *August*, 1862. They do not, however, think that by reason of that possession, which began in the time of the *Maha Koer*, *Rutta Koer* was, when this Bond is alleged to have been executed, incapable of binding herself by contract. They have already observed that, in order to effect such a disqualification, the Regulations must be strictly pursued. Under this Regulation the Collector is to report a female Proprietor as disqualified to the Board of Revenue, and the Board of Revenue, in their capacity of a Court of Wards, are to report that they have taken the estate under their charge, to the Governor-General in Council, so as to enable him to exercise his discretion of exempting her from the operation of the Regulation. Nor are these mere forms; they are necessary preliminaries to the disqualification of a female, so as to invalidate an alienation even of the property under charge of the Court of Wards by her. This was expressly decided in the case of *Jan Khátoon v. Khwaja Ali Mullah* (5 *Ben. Sud. Dew. Ad. Rep.*, 240). That case arose in *Lower Bengal*, and under Regulation X. of 1793. But Regulation LII. of 1803 is little, if anything, more than an extension of the earlier Regulation to the *North-Western Provinces*. The provisions of the two Regulations upon the point in question are absolutely identical.



Again, the present case is far stronger than that of *Jan Khátun v. Khwaja Ali Mullah*. The Bond here impeached does not, like that which was then in question, affect the land. It is a simple money obligation. And the evidence in this case not only fails to show that the necessary reports of the Collector and of the Board of Revenue were made; it also, though not uniformly consistent, goes far to negative any intention on the part of the Revenue authorities to treat *Rutta Koer* as a disqualified Proprietor, or a person incompetent to manage her affairs. It shows, that when her title was attacked in 1855, they declined to act as a Court of Wards in its defence, but left her to sue or be sued, as a person *sui juris*, on her own responsibility, and at her own cost. It further shows that in 1856, and in the very month in which she is alleged to have executed the Bond, they had taken all the necessary steps towards putting her into the full possession and enjoyment of the *Talook*, as a Proprietor competent to its management, on her entering into proper engagements for payment of the Government revenue; and that the completion of that arrangement was only prevented by the accident of the Mutiny. The fact, if fact it be, that for some time in and after the year 1858, the property was regularly managed by the Court of Wards, can have no bearing on the question of her capacity to bind herself by contract in 1856.

The decisions of the Principal *Sudder Ameen* of *Meerut*, and of the *Sudder Court* of *Agra*, nevertheless rested exclusively on the ground, that *Rutta Koer* had no capacity to contract debts, because the *Talook* was in the custody of the Court of Wards. The *Sudder Court* expressed itself thus: "Holding

1867.  
 MOHUMMUD  
 ZAHOR  
 ALI KHAN  
 v.  
 MUSSUMAT  
 THAKOO-  
 RANEE  
 RUTTA KOER.

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN

v.

MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

the opinion, that the superintendence of the Court of Wards did not cease until the year 1862, and hence the *Rutta Koer* was not competent to incur any debt, or make any alienation of her property, or that she is in any way answerable for the claims, there is no necessity for our inquiring into the second issue."

The question, whether any formal report was ever made of *Rutta Koer* being a disqualified female was left wholly unnoticed.

The attention of the *Sudder* Court was called to the unsatisfactory nature of the decision in this respect on an application by the present Appellant for a review of the judgment, when he stated, as one of the grounds of his application, that "no formal Order was passed placing *Rutta Koer* under the charge of the Court of Wards. Hence, though the property to which she succeeded may have been under the charge of the Court of Wards, yet *Rutta Koer* in person was a free agent, and should be held responsible for her acts." And the *Sudder* Court, in refusing leave to review, gave the following, among other reasons, for so doing:—"Even allowing, for the sake of argument, that no formal Order was given during the years 1855, 1856, and 1857, placing the person of *Mussumat Rutta Koer* under the charge of the Court of Wards, yet, as it is admitted by the Counsel for the Plaintiff, that the property to which she succeeded was under the Court of Wards during 1855, and a part of 1856, we cannot allow that such omission, if omission there be, in any way affects the case, for to all intents and purposes *Mussumat Rutta Koer* was under the charge of the Court of Wards. We are unable to dissociate the person of *Mussumat Rutta Koer* from the property



to which she succeeded. We think that she, in person, and her property were under the charge of the Court of Wards, and that she was not free to contract debts, and to hypothecate her property for the liquidation of such debts. Regulation LII. of 1803 certainly does provide for the liquidation of the just debts of disqualified Landholders,—‘just debts now outstanding against, or hereafter adjudged against the estates of disqualified landholders;’ but it does not permit a Ward to contract debts without the sanction of the Court of Wards. It would be strange indeed if the law allowed the Ward to contract debts, to alienate and hypothecate property under charge of the Court of Wards, when it distinctly declares that the Manager in charge shall not dispose of any portion of the property confided to his care without the consent of the Court of Wards.”

For the reasons already given, their Lordships cannot agree with this conclusion. They are of opinion, that the finding of the Courts below, on the only issue which they have really tried, is wrong.

They have, however, felt some doubt as to the Order which it will be their duty to recommend Her Majesty to make on this appeal. They have already intimated that the appeal must be dismissed against all the Respondents except *Rutta Koer*; and they have felt some doubt whether, inasmuch as the suit was wholly misconceived, the proper course was not to dismiss this appeal altogether, without prejudice to the right of the Appellant to bring a new suit against *Rutta Koer* upon this Bond, treating it as a mere money Bond. Considering, however, that such a suit would probably be met by a plea of the Act of Limitations; that in the circumstances of this case

1867.

MOHUMMUD  
ZAHoor  
ALI KHAN  
v.  
MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

1867.

MOHUMMUD  
ZAHOR  
ALI KHAN  
v.  
MUSSUMAT  
THAKOO-  
RANEE  
RUTTA KOER.

such a defence would be inequitable; and that, the Respondent not having appeared, their Lordships are not in a condition to put her on terms as to her defence to a fresh suit; they have come to the conclusion that the fairer course is to do what the Judge of the Court of First Instance might, under the Code of Procedure, have done at an earlier stage of the course,—namely, allow the Appellant to amend his plaint so as to make it a plaint against *Rutta Koer* alone for the recovery of money due on a Bond. Her liability on the Bond may thus be tried on the issues already settled. Upon those issues, and the evidence taken on them, their Lordships will intimate no opinion. The nature of the transactions, and the *status* of the Obligor, make it peculiarly desirable that the appellate Court should have the benefit of the judgment of the Courts below on those issues.

The Order, therefore, which their Lordships will humbly recommend to Her Majesty is, that the appeal be dismissed against all the Respondents except *Rutta Koer*; that the decrees of the Courts below be reversed, except so far as they dismiss the suit against those Respondents with costs; that it be declared that *Rutta Koer* was not, at the date of the alleged Bond, incapable of binding herself by contract by reason of the *Talook Chukkatul* being still in the custody of, or under the charge of the Court of Wards; that the cause be remanded to the High Court of Judicature for the *North-Western* Provinces, with directions to allow the Appellant to amend his plaint so as to make it a plaint against *Rutta Koer* alone for the recovery of the money alleged to be due to him on the Bond; and to take all necessary steps for the trial of the said suit upon the issues already



settled, or to be hereafter settled ; with liberty to the Respondent, *Rutta Koer*, to make any defence to the suit which is not inconsistent with the declaration aforesaid. Their Lordships will give no costs on this appeal.

1867.  
 MOHUMMUD  
 ZAHOR  
 ALI KHAN  
 v.  
 MUSSUMAT  
 THAKOO.  
 RANEE  
 RUTTA KOER.

BHUGWANDEEN DOOBEY ... *Appellant ;*

AND

MYNA BAE ... *Respondent.\**

*On appeal from the Sudder Dewanny Adawlut,  
 North-Western Provinces, Agra.*

IN this appeal, the suit was brought in the Court of the Principal *Sudder Ameen* of *Benares*, by the Respondent, as the sole surviving Widow and heiress-at-law of *Rae Deenanath*, a Hindoo inhabitant of *Benares*,

Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, the Right Hon. Sir Richard Torin Kindersley, and the Lord Justice Rolt.

Assessor :—The Right Hon. Sir Lawrence Peel.

of his Widow's *Stridhun*, and she has no power to alienate the estate inherited from her Husband, to the prejudice of his heirs, which, at her death, devolves on them.

The estate which two Hindoo Widows take in their Husband's property is a joint estate.

Where a childless Hindoo dies, leaving two Widows surviving, they succeed by inheritance to their Husband's property as one estate in coparcenary, with a right of survivorship ; and there can be no alienation or testamentary gift by one Widow without the concurrence of the other.

2nd, 3rd & 6th  
 Dec, 1867.

By the  
 Hindoo law  
 prevailing in  
*Benares* (the  
 Western  
 School) no  
 part of the  
 Husband's  
 estate, mov-  
 able or im-  
 movable,  
 forms portion

1867.

BHUGWAN-  
DEEN DOOBEY

v.

MYNA BAE.

who had died childless, against the Appellant personally, and as guardian of his Son, *Kaloo Ram*, a Minor, to recover possession of a moiety of the self-acquired movable and immovable estate of *Rae Deenanath*, which had been in possession of *Doola Bae*, then deceased, the other Widow and co-heiress of *Rae Deenanath*; and to set aside a testamentary disposition of *Doola Bae*, whereby she gave the moiety of the estate she was in possession of to the Appellant, *Bhugwandeem Doobey*, her Father, and *Kaloo Ram*, her Brother; and also to render inoperative an Order made in a Miscellaneous suit, under Act, No. XIX. of 1841, which upheld the possession of the Appellant in the moiety given by the Will of *Doola Bae*.

The question raised by the suit was, whether by the Western School of Hindoo Law, prevalent in *Benares*, where the estate was situate, where there were two Widows, coheiresses-at-law and representatives of a deceased Hindoo resident of *Benares*, each of whom had on his death succeeded separately

One of two Widows died, having made a testamentary disposition whereby she gave the moiety of her Husband's estate, which she had been put in possession of, to her Father and Brother. In a suit brought by the surviving Widow to recover the moiety—Held, that the surviving Widow was entitled to the share of the deceased Widow.

A summary Order made by a Judge under Act, No. XIX of 1841, not in a suit, but on an application for immediate possession, in consequence of differences having arisen in the family, giving possession in equal moieties to two Widows, although acquiesced in by the Widows, by each taking possession of a moiety, does not amount to a partition of the estate.

Upon an application for review of judgment before the *Sudder Court*, the written grounds for review impugned the correctness of the decision of the Court below, on grounds that related solely to the immovable estate, and not to the movable estate, also in question in the suit—Held, that, notwithstanding the terms of the 378th section of the Code of Procedure (Act, No. VIII. of 1859) it was competent to the Judges, by whom the Order allowing the application for review was made, to enlarge those grounds on an oral application, by including movables, if satisfied that there was a proper case on the merits for so doing.

*Semle*:—If the Court below was wrong in its procedure, such miscarriage will not prevent the Judicial Committee from deciding the question, with respect to the power of disposition of the movables.



and severally under an Order made by a Judge in a summary suit, pursuant to the Act, No. XIX. of 1841, to moieties of his whole movable and immovable estate, either of them could in her lifetime alienate or give by way of testamentary disposition her moiety, or any portion of the movable or immovable property included therein, to her blood relations, to the exclusion of the surviving Widow, or the heirs of their deceased Husband who might be alive at the time of surviving Widow's decease.

1867.  
 BHUGWAN-  
 DEEN DOBBEY  
 7.  
 MYNA BAE.

The decree of the Principal *Sudder Ameen* (Mr. *Robert H. Smith*) determined this point in favour of the Appellant, on the ground, that there had been a division declared and effected by a competent Court, namely, the Judge of *Benares*, by his summary Order for possession, under Act, No. XIX. of 1841, and that such division having been acquiesced in by the Respondent, the estate of *Rae Deenanath* thereby became a divided and separate estate, to a moiety of which *Doola Bae* succeeded exclusively as her own inheritance, and which she was competent to leave to whomsoever she pleased; and that the disposition so made by her to her Father and Brother was valid.

The *Sudder Dewanny Adawlut* at *Agra*, consisting of Messrs. *Ross*, *Edwards*, and *Roberts*, also held, that the estate was so divided, but as the Hindoo Law prevailing in *Benares* did not in this respect differ from that prevalent in the Province of *Bengal*, that *Doola Bae* was incompetent to make any testamentary disposition of the property which had been allotted to her under the summary Order to the prejudice of the Respondent, who was her copartner in respect thereof until such copartnership had been dissolved. Hence this appeal.

1867.

BHUGWAN-  
DEEN DOOBAY  
v.  
MYNA BAE.

The facts and issues raised by the suit are fully stated in the judgment.

The appeal was argued by

Mr. *Kay*, Q.C., and Mr. *J. Bell*, for the Appellant ; and

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Respondent.

The following authorities were cited :—

Upon the question, whether by the Western School of Hindoo Law, current in *Benares*, a Hindoo Widow was competent to dispose of her husband's self-acquired estate, movable or immovable, which she, as a Hindoo Widow, had inherited from her husband, by testamentary disposition, or deed of gift, to the prejudice of his heirs, *Mussumat Thakoor Deyhee v. Rai Baluk Ram* (a) ; *Keerut Sing v. Koolooahul Sing* (b) ; *Katama Natchier v. The Rajah of Shivagungah* (c) ; *Cossinaut Bysack v. Hurroosoondry Doss* (d) ; *Morley's Dig.*, N. S., tit. "Hindu Widow," p. 180, Note. *Colb. Dig.*, Vol. III. pp. 458, 464-8, 575 ; *The Vivada Chintamani*, pp. 256, 266 (Trans. by *Prossonno Coomar Tagore*) ; *W. H. Macnaghten's "Hindu Law,"* Vol. I. pp. 19, 48, 50 ; *Ib.*, Vol. II. p. 46 ; *The Madras Jurist*, 31st of *March*, 1866, p. 128 ; 1 *Strange's "Hindu Law,"* pp. 247, 268 [2nd Edit.] ; *The Mitacshara*, ch. II. sec. xi. cl. 2, and cls. 11 to 25, were cited.

As to the estate two Widows take, whether as tenants in common or in coparcenary, *W. H. Macnaghten's "Hindu Law,"* Vol. I. p. 38, was cited.

And, whether the summary Order of the Judge, under Act, No. XIX. of 1841, and the acquiescence

(a) *Ante*, 139.

(b) 2 Moore's Ind. App. Cases, 331

(c) 9 Moore's Ind. App. Cases, 539. (d) 2 Morley's Dig. 204-5, 214.



of the Widows and possession by them of the moieties operated as an estoppel and a bar to the Plaintiff's claim, *Meer Nujeeb Ullah v. Mussumaut Kuseema* (a); *Rawlins v. Powel* (b); *Goodeve* "On Evidence," p. 325, were cited.

Upon the construction of the 378th section of the Act, No. VIII. of 1859, and the power of Court on an oral application to amend the written grounds of appeal, *Broughton's Practice of the High Court, Calcutta*, p. 28, was cited; and that the Court would not make a decree upon a variance of plea and proof, *Narainee Dosse v. Nurrohurry Mohonto* (c); *Morley's Dig., N. S., tit. "Practice,"* p. 312, were relied on.

At the conclusion of the arguments the case stood over for consideration.

Judgment was now delivered by

The Right Hon. Sir JAMES W. COLVILE.

The following are the undisputed facts upon which this appeal arises:—

*Rae Deenanath*, a Hindoo Banker, of great wealth, carrying on business at *Benares*, *Hyderabad*, and other places, died at *Benares* on the 7th of June, 1855, childless. He was separate in estate from his brethren, if he had any; his wealth is said to have been self-acquired; and consequently his co-heiresses, according to the Hindoo law of the *Benares* school, were his two Widows, viz. the Respondent and *Doola Bace*, since deceased. Immediately after his death, however, a document, purporting to be a Will executed by him in favour of one *Hunwunt Pershad*, to whom, jointly with a person named *Bithul Pershad*, it gave the

(a) 1 Ben. Sud. Dew. Ad. Rep., 10.

(b) 1 P. Will., 297.

(c) 1 Marshall's App. Cases, Ben., 70.

1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BARE.

14th March,  
1868.

1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BAE.

management of the property, was propounded. The title of *Hunwunt Pershad*, claiming under this alleged Will, or as the adopted son of *Rae Deenanath*, has since been litigated in the Indian Courts, which have uniformly pronounced against it. An appeal to Her Majesty in Council against their decisions is pending (a), but it has not yet been set down for argument, in consequence of the death of one of the parties; and for the purposes of this appeal it must be assumed that *Rae Deenanath* died childless and intestate, and that the claim of *Hunwunt Pershad* was unfounded. Nor would it be necessary to refer to that claim but for the arguments which the Appellant's Counsel have founded on the partition between the Widows, which was in some measure caused by it, and upon the alleged collusion of the Respondent with the Claimant.

The first consequence of the claim was that a summary suit, under Act, No. XIX. of 1841, to determine the right to the immediate possession of the property, was instituted in the name of *Doola Bae*, who was then a Minor, by her Uncle and Guardian, in which a Curator was appointed under that Act. When this suit came to a hearing the Judge pronounced against the Will, and directed that the whole estate of *Rae Deenanath* should be equally divided between the Widows, and that the Curator should carry out that order without delay. The property was thereupon divided; each Widow was put in possession of her share; and *Doola Bae* continued in the separate possession and enjoyment of her share up to the time of her death.

She died on the 10th of *November*, 1857, having on the 21st of *August*, 1857, made a Will, which was

(a) *Mussamat Lutchmee v. Bhuguandeen and others.*



registered on the same day, whereby she disposed of her share of the property inherited from her Husband in favour of her Father (the Appellant), and her infant Brother, *Kaloo Ram*, who is also represented by the Appellant on this appeal.

Some steps seem to have been taken by the Respondent, and also by *Hunwunt Pershad*, to resist the registration of this Will in the lifetime of *Doola Baee*; and upon her death the Respondent applied for the attachment of the property in dispute, being that taken by *Doola Baee* under the partition, as specified in the list before referred to; and for the appointment of a Curator under Act, No. XIX. of 1841. Her application having been dismissed by the Judge, who on that summary proceeding upheld *Doola Baee's* Will, she commenced the regular suit out of which this appeal has arisen, on the 21st of *December*, 1857, in the Court of the Principal *Sudder Ameen* of *Benares*.

The issues settled in the suit were :—

First, whether there was any informality in the institution of the suit.

Second, whether the Plaintiff (the Respondent) was legally competent to institute it.

Third, whether *Doola Baee* was a Minor or not at the date of the alleged execution of the Will.

Fourth, whether the Will was fraudulent or a *bonâ fide* instrument.

Fifth, if a person die leaving two Widows, and one of the Widows subsequently dies leaving a Will, who is entitled to succeed according to the *Shasters*, the surviving Widow or the Legatee of the Will (supposing the Husband's estate to have been divided between the Widows, and also supposing no such division to have been made)? And is a Widow

1867.

BHUGWAN-  
DEEN DOOBEE  
v.  
MYNA BAE.

1867.

BHUGWAN-  
DEEN DOOBEY

v.

MYNA BAEF.

competent to make a Will in favour of her Brother and Father under the *Shasters*?

The third and fourth issues may be dismissed from consideration. Both have been found by the Courts below in favour of the Appellant, and the correctness of this finding is not now impeached.

Upon the other issues the Principal *Sudder Ameen* found—first, that the Respondent could not maintain her suit, because it was brought on grounds wholly inconsistent and irreconcilable with the averments made by her in the suit, under Act, No. XIX. of 1841, wherein she had supported the claim of *Hunwunt Pershad*; secondly, that by reason of the partition, *Doola Bae* was fully competent to leave her property to whomsoever she pleased; and accordingly he dismissed the suit with costs.

There was an appeal to the *Sudder Court* at *Agra*. The first judgment of that Court was adverse to the finding of the Principal *Sudder Ameen* on the first and second issues, and decided that the Respondent, notwithstanding her former acts and averments, was competent to maintain the suit. But holding, that *Doola Bae* was competent to dispose of the inheritance derived from her Husband, when it had been distinct and divided, and had effectually done so, it dismissed the appeal. It treated her power to dispose of the movable property as certain; her power to dispose of the immovable property as more open to question.

The Respondent applied for a review of this judgment. The nature of her application and the proceedings upon it will have to be more particularly considered hereafter. The result of it was, that the case was re-heard before a full Bench, when the Court decided that, according to the law of the *Benares*



school, *Doola Baee* was incompetent to dispose of either the movable or immovable property which she had inherited from her Husband, and made a decree in favour of the Respondent. The present appeal is against that decree.

1867.  
  
 BHUGWAN-  
 DEEN DOOBEE  
 v  
 MYNA BAAE.

From the foregoing statement it is obvious, that the principal question between the parties is the broad and general one, whether, according to the law of the *Benares* school, a Hindoo Widow is competent to dispose, by Will or deed of gift, of either movable or immovable property inherited from her Husband, to the prejudice of his next heirs.

The learned Counsel for the Appellant have, however, contested the right of the Respondent to have the present case decided on this issue upon various grounds. They contend, first, that, if not precluded from maintaining the suit by reason of her acts and averments in former proceedings, as ruled by the Principal *Sudder Ameen*, she has so shaped her case on the pleadings, that she cannot in this suit insist on her rights, whatever they may be, as next heir of her Husband in succession to *Doola Baee*; secondly, that it was not competent to the *Sudder Court*, having regard to the application for review and the proceedings thereon, to review its first decision, except as to the immovable property.

Two other points were taken at the Bar, which it will be convenient to consider after, rather than before the determination of the principal and general question of Hindoo Law. One was raised by Mr. *Leith* on behalf of the Respondent, and was to the effect that, as one of two Hindoo Widows taking as coheirs to their Husband, she is in a more favourable position than that of a person claiming as next heir

1867.

BHUGWAN-  
DEEN DOOBEY  
7.  
MYNA BAE.

of the Husband in succession to a single Widow deceased.

The other, which was taken by the other side, is what was the effect of the partition, either by way of enlarging the power of *Doola Bae* to dispose of the property, or affecting the right of the Respondent to question her disposition. Their Lordships will consider all these questions in their order.

At the close of the argument for that Appellant they intimated, that in their judgment the Respondent was not precluded, either by her acts or averments, or by her form of pleading in this suit, from insisting on her rights as heir of her Husband against the claims of *Doola Bae*. Their Lordships agree generally in that part of the first judgment of the *Sudder* Court, which ruled that the Respondent, because she originally acquiesced in the title set up by *Hunwunt Pershad*, had not lost any rights which accrued to her as one of the coheirs of her Husband, when that claim was decided to be untenable. Nor do they think, that her alleged alienation of her share can be urged against her by the Appellant as a bar to the present suit. It may have been an improper act; it may be one which *Doola Bae*, had she been the survivor of the two Widows, could have questioned, or which the next heirs of *Rae Deenanath* may yet question; but the improper alienation of part of her Husband's estate cannot affect the Respondent's right to recover other parts of it from those who, if her view of the law is correct, have no title to it.

And upon the argument founded on the pleadings their Lordships have to observe, that the plaint does not inaccurately state the Respondent's claim to the right to succeed, on the death of *Doola Bae*,



to that property which the latter took by inheritance from her Husband. The replication and the petition of appeal from the decree of the Court of First Instance are no doubt more open to the objection taken. In order to meet the case of quasi-estoppel set up, they attempt to draw a distinction between the claim to the original share which the Respondent took on her Husband's death, and her claim to that to which she became entitled on *Doola Bae's* death; and make some confusion as to the character of her heirship. But this misleading has in no degree prevented the settlement of proper issues, or prejudiced the fair trial of the real question of right between the parties; and that being the case, it would be contrary to the practice of their Lordships to give effect to nice and critical objections founded on the inaccuracy of an Indian pleading.

The next question is, whether the decree now under appeal ought to be reversed, as far as it affects the movable property, merely on the ground that it was not competent to the *Sudder* Court to review its prior decree, with respect to that portion of the property in question in the suit.

Their Lordships are not satisfied, that the proceedings on review were not within the powers of the *Sudder* Court. Two objections have been taken to them—first, that the Respondent never petitioned for a review of judgment, except as to the immovable property; next, that whatever was the scope of her petition, the Order of Mr. *Gubbins* upon it, must be taken to have conclusively confined the review to the immovable property.

Upon the first point, their Lordships think, that the application for review must, on a fair construction of

1867.

BHUGWAN-  
DEEN DOBBY  
v.  
MYNA BAE.

1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BAEF.

it, be taken to embrace the question as to the movable as well as that relating to the immovable property. The first plea seems to be confined to the latter; but the second plea is more general. It insists that the opinion of the *Calcutta Pundit* ought to be accepted as correct. That opinion made (as he himself stated in his second opinion) no distinction between movable and immovable property, but denied the right of the Widow to dispose of either, to the prejudice of her Husband's heirs.

Again, as regards the acts of the Court: the article of the Code of Procedure which is supposed to have tied the hands of the Judges is the 378th. It is clear, however, that the final Order contemplated by that section was the Order which, in the ordinary course, would have been made by Messrs. *Ross and Pearson* on the 15th of *January*, 1863. The proceeding of Mr. *Gubbins* was merely his fiat for the issue of that notice to the opposite party, which is required by the proviso of that section.

It may be admitted, that Mr. *Gubbins* understood the application to be limited to the immovable property; that he so limited the notice; and that when the parties were together in presence before Messrs. *Ross and Pearson*, the written grounds for review impugned the correctness of the decision, so far as it related to the real property only. But the question still remains, whether it was not competent to the Judges, by whom the Order allowing or rejecting the application for review was to be made, to enlarge those grounds on the oral application of the party, if satisfied that there was a proper case on the merits for so doing. There seems to be nothing in the Code of Procedure which expressly prohibits them from so



doing. And their Lordships are of opinion, that Messrs. *Ross* and *Pearson*, though they might have made a final Order, granting or rejecting the application *in toto*, or in part, were not incompetent to make the qualified Order which they did make, leaving in the Court which was to review the decision, a discretion as to the extent to which the review should be carried.

They are also of opinion that, even if the Court below had been wrong in its procedure, its miscarriage ought not to prevent this Committee from deciding the question touching the disposition of the movable estate on its merits. There has been no surprise. The question was fully argued before the full Bench of the *Sudder* Court on ample notice to both parties. It has been fully argued here. The objection, therefore, is purely technical, and the result of yielding to it might be to place the Respondent at a very unfair disadvantage. She had a right to appeal to Her Majesty against the whole or any part of the first decree of the *Sudder* Court. She would not have lost that right of appeal even if she had limited her application for a review to the immovable property. She was relieved from the necessity of appealing by obtaining a final decree in her favour as to the whole of the property, whether movable or immovable. If this objection were to prevail, there could be no final determination of the question as to the former or its merits; unless, indeed, for the sake of doing substantial justice between the parties, their Lordships were now to allow her to appeal against that portion of the first decree of the *Sudder* Court. They are of opinion, that no such formality is necessary; and

1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BAEZ.

1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BAREE.

that it is competent to the Respondent, who has been brought here on appeal, to maintain, if she can, the decree which is under appeal, by showing that it is right upon the merits.

Their Lordships being, therefore, of opinion, that there is no obstacle to the determination on this appeal, and between these parties, of the general question involved in the judgment under appeal, will now address themselves to the consideration of that question.

The parties have brought together a large amount of conflicting authority concerning it, consisting partly of the *Bywustas*, or opinions of *Pundits*, partly of decided cases, and partly of passages from ancient or modern authorities, which are accepted as authoritative in the Courts of *India*.

It is impossible to reconcile the various opinions of the *Pundits* which are to be found in the Record. They are divisible into three classes—namely, first, that of opinions taken in other suits; secondly, that of opinions taken by the parties themselves for the purposes of this suit; and thirdly, that of opinions given in answer to the questions put by the *Sudder* Court in this suit.

Of the first class are No. 10 of the Record—probably No. 11 of the Record—No. 33 and No. 28 of the Record. Three of these are not very material. As far as they go, the first two support the contention of the Respondent; the third seems to be good law, but it has really no bearing on the question now under consideration. The point was, whether on the death of the Widow, the Daughter or a Nephew should succeed to property derived from the Husband; and inasmuch as the Widow could not have taken



1867.

BHUGWAN-  
DEEN DOOBEE  
v.  
MYNA BAE.

the property if it had not been divided, it followed that it must continue to descend in the course of succession to separate estate; and, therefore, to a Daughter before a Nephew. The fourth is strong against the right of a Widow to alienate immovable property inherited from her husband; and the case in which the opinion was taken was decided in accordance with it. But the opinion being apparently that of the same *Calcutta Pundit* who was consulted in this case, it is material only as showing that he has in other cases rejected the doctrine that a Widow has power to dispose of land inherited from her Husband.

The second class consists of No. 12 of the Record, being the opinion of thirty-seven *Benares Pundits* filed by the Respondent; and of No. 14 of the Record, being the opinion of twenty-one *Pundits* of the same place, filed by the Appellant. The first ruled that the surviving Widow was entitled to succeed to the share of the deceased Widow; and that that right could not be defeated by the disposition of the deceased Widow. The other goes the length of contesting the right of one Widow to succeed to another Widow of her deceased Husband in any case; it affirms the proposition that the property being once vested in the Widows, each had an absolute interest in her share, and might dispose of it as she pleased. It held also, that in the case of intestacy, the Father and Brother of the deceased Widow would have been the persons entitled to inherit her share.

The third class consists of No. 4 of the Record, being the opinion of *Ram Nath*, one of the *Pundits* at the *Sudder Court* of *Agra*; of No. 7 of the

1867.

BHUGWAN-  
DEEN DOBBY  
v.  
MYNA BAE.

Record, being the opinion of the four *Benares Pundits*, taken by the Judge of that place, under Orders from the *Sudder Court* as *Agra*; No. 5 of the Record, and No. 3 of the Record being the two opinions of *Heerna Nund*, the other *Pundit* at the *Sudder Court* of *Agra*; and No. 6 of the Record, and No. 2 of the Record, being the two opinions of the *Calcutta Pundit*. All these, except the later opinions of *Heerna Nund* and of the *Calcutta Pundit*, which were taken on the proceedings in review, were given in answer to the questions put by the *Sudder Court* being its first judgment.

The questions were prefaced by the following preamble, or statement:—

*A* dies, leaving two Wives, *B* and *C*, who inherit his property, real and personal. *B* and *C* make a complete partition of the property, and live separately from each other. *C* dies, having as blood relations a Brother and an Uncle; and the questions were—

First. Does the property left by *C* descend by inheritance to the other Widow, *B*, or to the Brother or Uncle of *C*?

Second. Would *C* be competent to bequeath by Will to her blood relatives the share of the property which she inherited from *A* (so divided), to the prejudice of *B*, who is still living?

It will be observed that this statement assumes a complete partition by the act or contract of the two Widows, and it substitutes an Uncle for the Father of the deceased Widow. The only variation in the references to the different *Pundits* was that, from accident or design, that to *Heerna Nund* was confined to real property.

To these questions the four *Benares Pundits*



1867.

BHUGWAN.  
DEEN DOOBEE  
v.  
MYNA BAE.

answered:—First, that the Brother of *C* was her foremost heir, and after him her Uncle, and that while these two existed *B* could not succeed. Second, that any Testamentary disposition by the Widow of the property which she had inherited from her Husband should be held valid the property having been exclusively her own, and that she was, therefore, at liberty to dispose of it in any way she thought proper.

Three out of the four consulted *Pundits*, appear to be included amongst the twenty-one, who had previously given the opinion above referred to at the instance of the Appellant, and accordingly the two opinions are, as might be expected, to the same effect; except, perhaps, that the second does not deny so strongly as the first the right of the surviving Widow to succeed to the share of the deceased Widow in any case.

The answer of *Ram Nath* to the first question was, that *C*'s share would descend by inheritance to *B*, because *C* could not be succeeded by her Brother or Uncle during the existence of her Husband's *sapinda*; and although, in his answer to the second question, he admits the power of *C* to defeat this right of *B* by her Will, he rests that power of disposition solely on the partition assumed by the statement. He says expressly, "She could not have done so had the property been jointly held." He makes no distinction between real and personal estate.

The answers of *Heerna Nund* and the *Calcutta Pundit*, upon which the ultimate judgment was in great measure grounded, was, of course, in favour of the Respondents on both points. They, too, make no distinction between real and personal property. The first opinion of *Heerna Nund* was confined to real

1867.

BHUGWAN-  
DEEN DOOBAY  
v.  
MYNA BAEK.

property ; but this, as he explained in his second opinion, was because the reference to him was so confined.

The following then, is the result of the *Bywustas* of the *Pundits* :—If the partition, the effect of which will be afterwards more fully considered, were out of the question, all the Court *Pundits* would agree in holding, that the Respondent, as the next heir of her Husband, is entitled to take by succession the share of *Doola Bae* ; and that that right cannot be defeated, either as to movable or immovable property, by the Will of *Doola Bae*. *Ram Nath*, however, holds that, by reason of the partition, *Doola Bae* acquired the right of disposition. Again, the twenty-one or twenty-two *Benares Pundits* who are in favour of the Appellant's title are opposed by the twenty-seven *Pundits* of the same place, who have given their opinion in favour of the Respondent. And the *Bywustas* given in other cases are more favourable to the Respondent than they are to the Appellant.

The *Benares Pundits* who are in favour of the Appellant refer only generally to the *Mitacshara*, but the particular passages on which they rely are probably the 1st and 11th sections of the second chapter, and especially the second article of the 11th section. Those passages, and the arguments in favour of the Widow's right of disposition which were deduced from them, were lately under the consideration of this Committee in the case of *Mussumat Thakoor Deyhee v. Rai Baluk Ram* (*ante*, p. 175). The following is the conclusion to which their Lordships then came :—“ The result of the authorities seems to be that, although, according to the law of the Western schools, the Widow may have a power of



disposing of movable property inherited from her Husband, which she has not under the law of *Bengal*, she is, by the one law, as by the other, restricted from alienating any immovable property which she has so inherited ; and that on her death the immovable property, and the movable, if she has not otherwise disposed of it, pass to the next heirs of her Husband." To the authorities then cited and reviewed by their Lordships may be added Sir *W. Macnaghten's* observations in his work on "*Hindoo Law*," Vol. I. pp. 19 to 21 ; Cases XIV. and XV. in the second Volume of the same work, pp. 32 and 37 ; and also some of the cases which will hereafter be mentioned, which, whilst they support the doctrine of the Widow's power to dispose of movable property, admit that she cannot dispose of immovable property inherited from her Husband.

It must, then, be taken upon the authorities to be settled law that under the law of *Benares* a Hindoo Widow has not the power to dispose of immovable property inherited from her Husband to the prejudice of his next heirs ; and the only question open to doubt is, whether she has any such power over movable property.

It must be admitted that, in favour of this supposed distinction, there appears at first sight to be a considerable body of positive authority. In the case of *Cossinauth Bysack v. Hurroosoondury Dabee*, the leading case upon the rights and disabilities of a Hindoo Widow in *Bengal*, it was at first supposed that the distinction was recognized even by that School. The first decree in that case declared the Widow entitled to an interest for life in the immovable, and to an absolute interest in the movable

1867.

BHUGWAN-  
DEEN DOOBEE  
v.  
MYNA BAKE.

1867.

BHUGWAN-  
DEEN DOOBEYv.  
MYNA BAE.

estate of her late Husband. That was altered by the decree made on a Bill of review, which declared her entitled to the real and personal estate of her Husband, to be possessed, used, and enjoyed by her as a Widow of a Hindoo Husband, dying without issue, in the manner prescribed by the Hindoo law. On an appeal from that decree the whole subject was reviewed by Lord *Gifford*. His judgment (which is reported in the Appendix to Mr. *Longueville Clark's* Rules and Orders), whilst it establishes that, according to the law of *Bengal*, there is no distinction between movable and immovable property in respect to the Widow's power of disposition over it, seems to proceed on the ground that the Treatises known as the *Vivada Chintamani* and the *Ratnacāra* are overruled and qualified in this respect by the *Daya-Bhāga* and *Dayatutwa*, which give the law to Lower *Bengal*, and that where the two former Treatises prevail the distinction may exist. This judgment, therefore, affords some ground for the argument that the law of *Bengal*, which does not recognize the distinction, is an exception from the general Hindoo law. Again, in *Rajunder Narain Rae v. Bijai Gobind Sing* (2 Moore's Ind. App. Cases, 181), decided here in 1839, the right of the Widow to dispose of movable property inherited from her Husband, and its devolution on her dying intestate, are treated as open questions under the law of the *Mithila* school.

Of decided cases affirming the distinction, we have that in the High Court of *Bengal*, which was cited at the Bar from the *Indian Jurist* of the 31st of *March*, 1866, p. 128; and which appears to be a case governed by the law of the *Mithila* school.



We have further the four cases cited in the judgment in that case, of which two show that the distinction has been recognized by the *Sudder* Court of *Madras* as prevailing in the Presidency of *Madras*; and two show that it has also been recognized by the High Court of *Bombay* as prevailing in that Presidency. And, lastly, we have Case VII., at p. 46 of the Second Volume of Sir *W. Macnaghten's* "Hindoo Law," in which the law which ought to have been applied was that of the *Benares* school.

1867.  
 BHUGWAN-  
 DEEN DOOBEE  
 v.  
 MYNA BAE.

If it were clear that the law upon the point in question was necessarily the same for all parts of *India* except those Provinces of *Lower Bengal* which are governed by the *Daya-Bhága*, these cases might afford ground for saying that the doctrine under consideration, however questionable originally, must be taken to be now established by a course of decisions.

Is, however, this uniformity of the law to be presumed?

The Judges, indeed, of the High Court of *Calcutta* say, in the judgment just referred to, "This case comes from *Tirhoot*, one of the Districts forming the ancient Province of *Mithila*, but the law is admittedly the same in this particular both for *Mithila* and for the Provinces governed by the *Mitacshára*." Their Lordships, however, are not satisfied that this statement is correct.

The *Mitacshára* is no doubt accepted as a high authority by all the Schools, even by that of *Bengal*, when it is not controlled by the *Daya-Bhága*, and other Treatises peculiar to that School. But the other four Schools have, like that of *Bengal*, though in a less marked degree, their particular Treatises

1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BAE.

and Commentaries which control certain passages of the *Mitacshára*, and give rise to the differences between those Schools. In proof of this, it is only necessary to refer to the preliminary remarks of Sir *William Macnaghten*, pp. 21 to 23. From these it would appear that, whilst the *Mithila* School follows implicitly the *Vivada Chintamani* and the *Ratnacára*; the South of *India* the *Smriti Chandrika* and the *Madhavya*; and the Presidency of *Bombay* the *Vyavahára Mayúkha*; these works are by no means held in equal estimation at *Benares*.

Now, it appears from the judgment of Lord *Gifford*, that the works which were supposed to go furthest towards establishing the distinction between movable and immovable property, which is now under consideration, were the *Vivada Chintamani* and the *Ratnacára*. These may well be taken to establish such a distinction, according to the law of *Mithila*, and yet fail to do so according to the law of *Benares*. Again, the *Mayúkha* is cited as an authority for the decision of the case, at p. 43 of the second volume of *Macnaghten's Hindoo Law*. And, in the judgment under appeal, it is expressly stated that that Treatise is not accepted as an authority by the *Benares* school; and, consequently, that the case in question was not binding on the Court. In like manner the law established by the two decisions at *Madras*, if it be so established, may depend on Treatises and authorities peculiar to the South of *India*, and not accepted at *Benares*. From the reports of these, at p. 117 of the *Sudder Decisions* for 1849, and at p. 77 of the *Sudder Decisions* for 1850, it appears that both were decided on the *Bywustas* of *Pundits*. In the former




case the authorities relied on by the *Pundits* are not given ; but in the latter, mention is made of the Books called *Madhaveyen* and *Suraswativilása*, as well as of the *Mitacshára* (there called *Vijnyàneswara*) ; and it appears, from Sir *William Macnaghten's* remarks, that the two latter works are of paramount authority in the Territories dependent on the Government of *Madras*, whilst they are not enumerated amongst the works accepted at *Benares*.

If this be so, it follows that, even if the above-mentioned cases were correctly decided, they are by no means conclusive on the present question. The decision of the High Court of *Calcutta*, in so far as it confirmed the title of the Purchaser of the Government promissory notes, might have been rested on the general law relating to the transfer of negotiable paper, and that case, so far as it involved the question now under consideration, and the case in the second volume of *Moore's* Indian Appeal Cases, were determinable by the law of *Mithila* ; the two cases in the High Court of *Bombay*, and the cases, No. VII., at p. 46 of the Second Volume of *Macnaghten's* "Hindoo Law," were decided according to the peculiar law of the *Bombay* Presidency, including the *Mayúkha* ; and those at *Madras* according to the law of that Presidency. None of them necessarily govern a case to be decided according to the law of *Benares*.

How, then, does the law stand independently of these decisions ?

The startling differences of opinion amongst the *Pundits* show that the question cannot be taken to be clearly settled by the authorities accepted at *Benares*.

The text of the *Mitacshára*, on which, as has already been shown, the Appellant must mainly rely,

1867.  
  
 BHUGWAN-  
 DEEN DOOBEY  
 v.  
 MYNA BAAE.



1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BAE.

is the second paragraph of section XI. of Chapter II., which includes "property which she may have acquired by inheritance" in the enumeration of women's peculiar property. These words make no distinction between movable and immovable property ; yet it is settled, beyond all question, as we have already stated, that the immovable property which a woman inherits from her Husband cannot be disposed of by her, and does not pass as her *stridhun*. The legitimate inference from this seems to be, that neither movable or immovable property inherited from her Husband forms part of a woman's *peculium* or *stridhun*. Sir William H. Macnaghten, indeed, ("Hindoo Law," Vol. I., p. 38), excludes from *stridhun* all the different kinds of property enumerated in the last clause of the paragraph in question.

On the other hand, it may be argued that the text is explicit ; that it includes under the head of *stridhun* all property inherited from the Husband ; that from the fact of its inclusion the power of disposition over it is *primâ facie* to be inferred ; but that the right to alienate immovable property, whether inherited from the Husband or given by him in his lifetime, having been taken away by positive texts, the distinction in this respect between movable and immovable property has arisen.

This argument, however, would fail to show why immovable property, inherited from a Husband, should not (and all the decided cases show it does not) descend as *stridhun* ; but passes, on the Widow's death, to the next kin of the Husband. The truth seems to be, that the texts which restrict a woman's power of disposition over immovable property given to her by her Husband in his lifetime, are different



from those which both restrict her power over immovable property inherited from her Husband, and regulate the course of its devolution.

To the former class belong the text of *Nareda*; "Property given to her by her Husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or houses;" and the text of *Katyáyana*: "What a woman has received as a gift from her Husband she may dispose of at pleasure after his death, if it be movable; but as long as he lives, let her preserve it with frugality." To the second class belongs the text of *Katyáyana*, on which the judgment under appeal so much proceeds, viz.: "The childless Widow preserving inviolate the bed of her Lord, and strictly obedient to her spiritual Parents, may frugally enjoy the estate or property until she die; after her the legal heirs shall take it." We take these Texts as rendered by *Colebrooke*, Dig., Vol. III. p. 575 and p. 576.

It is impossible to deny, as will be seen on reference to the Digest, that there has been a considerable conflict of opinion amongst the Commentators concerning the texts. The better opinion, however, seems to be, that they relate to different subjects.

Again, the latter text certainly includes both movable and immovable property; and it seems to be only by reason of confounding the law as to property given by, with that relating to property inherited from the Husband, that the words "after her the legal heirs shall take it" can be restricted to the immovable portions of the Husband's estate. The preponderance of authority is certainly in favour of the proposition that, whether the Widow has or has

1867.

BHUGWAN-  
DEEN DOOBEY

v.

MYNA BAE.

1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BAE.

not the power to dispose of inherited movables, they, as well as the immovable property, if not disposed of, pass on her death to the next heirs of the Husband.

It is also worth remarking, that the doctrine that property inherited from her Husband forms part of a woman's *stridhun* receives no countenance from two of the Treatises current in other Schools which are supposed to recognize the Widow's power to dispose of movables so inherited. Both the *Vivada Chintamani* and the *Mayukha* confine *stridhun* within the definitions of *Menu* and *Katyáyana*. They exclude property inherited, and the other acquisitions which are comprehended in the last clause of the paragraph in the *Mitacshára*, but are excluded by Sir *W. Macnaghten*.

They have distinct chapters for "the separate property of women," and "her right of succession to a husband who leaves no son." The *Vivada Chintamani* expressly says (p. 262), that the text of *Katyáyana* does not refer to the peculiar property of a woman; and although it cites from *Katyáyana*, "Let a woman on the death of her Husband enjoy her Husband's property at her discretion," and explains "that this refers to property other than immovable," it also, at page 292, quotes from the *Mahabharata*, "For women the heritage of their Husbands is pronounced applicable to use. Let not women on any account make waste of their Husband's wealth;" to which it adds, by way of explanation, "Here waste means sale and gift at their own choice." (See *Vivada Chintamani*, pp. 256 and 266, and *Mayukha*, pp. 84 and 78).

Another argument against including the wealth inherited from her Husband in a woman's *stridhun*,



as defined by the 2nd clause of the 11th section of the 2nd chapter of the *Mitacshara*, may be derived from the clauses 11 to 25 (both inclusive) of the same section. These declare the Husband to be, in default of the issue, the heir to "the whole property as before described, cl. 11." This is intelligible, if the words "property which she may have acquired by inheritance," in the second clause, are considered to be property inherited in her Husband's lifetime, or from some persons other than him.

The reasons for the restrictions which the Hindoo law imposes on the Widow's dominion over her inheritance from her Husband, whether founded on her natural dependance on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient Texts importing the restriction are general. It lies on those who assert that movable property is not subject to the restriction to establish that exception to the generality of the rule. The diversity of opinion amongst the *Benares Pundits* is sufficient to show, that the supposed distinction between movable and immovable property is anything but well established in that School. And the unanimous judgment of the five Judges of the *Sudder Court*, supported by the opinion of the Court *Pundits*, has, in this case, ruled that the distinction does not exist. Such a judgment ought not to be lightly overruled.

Their Lordships, therefore, have come to the conclusion that, according to the Law of the *Benares School*, notwithstanding the ambiguous passage in the *Mitacshara*, no part of her Husband's estate,

1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BARR.

1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BAE.

whether movable or immovable, to which a Hindoo woman succeeds by inheritance, forms part of her *stridhun*, or particular property; and that the Text of *Katyáyana*, which is general in its terms, and of which the authority is undoubted, must be taken to determine—first, that her power of disposition over both is limited to certain purposes; and, secondly, that on her death both pass to the next heir of her Husband. They have already stated the grounds on which they think that the cases decided in *India* are not necessarily in conflict with those conclusions. It is unnecessary for them to express any opinion touching the correctness of those decisions; except that, in so far as they proceed—as that in the High Court of *Calcutta* unquestionably does in part proceed—on a different construction of the passage in the *Mitacshara*, they cannot be supported on that particular ground.

Their Lordships have now to consider, whether the effect of the so-called partition was to give *Doola Bae* any power of disposition over her share which she would not otherwise have had.

The case is wholly distinguishable from those in which a Widow, having a right to an ascertained share upon a partition with coparceners, who have an absolute interest in their shares, is put by them into possession of that share. In such case it may be a question, whether her interest does not become absolute; though in a case coming from *Lower Bengal* the contrary was decided by this Committee on an appeal from the Supreme Court of *Calcutta*. But here the so-called partition was between two Widows, each having the limited interest of a Hindoo Widow in her Husband's estate. It does not appear,



that it was made at the suit or on the application of either. It was made by Order of a Judge who, in the particular proceeding (one under Act, No. XIX. of 1841), had no jurisdiction to determine questions of title ; and who could only deal with the right to possession. It is difficult to see how such a partition could enlarge either Widow's estate, so as to give her a disposition which she would not otherwise have had against the next heirs of her Husband.

It may be said, that the question here is only, whether the Respondent has not, by her partition, lost her right by survivorship. There is, however, no proof of any contract to make a partition, and, as part of that contract, to release the rights of survivorship, supposing it to have been competent to the Widows to enter into such a contract. There was, as has already been shown, no jurisdiction in the Court to make a complete partition *in invitam*. The transaction seems to have been merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected. The acquiescence of the Widows in the Judge's proceedings cannot have done more than bind each not to disturb the other's possession.

If this be so, it follows that the opinions of those *Pundits* which were given in favour of the Appellant, on the assumption of a complete and regular partition, lose much of their power. It follows also, that the case of the Respondent is stronger than it would have been had she claimed merely as next heir to her Husband in succession to *Doola Baee*. For the estate of two Widows, who take their Husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes

1867.

BHUGWAN-  
DEEN DOOBEE  
v.  
MYNA BAE.

1867.

BHUGWAN-  
DEEN DOOBEY  
v.  
MYNA BAAE.

the whole property, to the exclusion even of Daughters of the deceased Widow (2 *W. H. Macnaghten's* "Hindu Law," p. 38, note 1). They are, therefore, in the strictest sense, coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other. And, accordingly, this case might have been decided in favour of the Respondent on this ground alone.

Upon the whole, then, their Lordships are of opinion, that the decree under appeal is substantially right, and ought to be affirmed. Considering, however, that what has here been decided in respect to *Doola Bae's* interest is equally applicable to that of the Respondent, and that the latter is said to have assumed a power of disposing of her own share, they think it may be well to insert in the decree a declaration, that the property recovered by the Respondent is to be possessed and enjoyed by her as a Widow of a Hindoo Husband dying without issue, in the manner prescribed by the Hindoo law. Their Lordships will humbly recommend Her Majesty, with that variation, to confirm the final decree of the *Sudder* Court of *Agra*. The Appellant must pay the costs of this appeal.

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NAWAB UMJAD ALLY KHAN ... *Appellant*;

AND

MUSSUMAT MOHUMDEE BEGUM and  
 MUSSUMAT NAWAB BEGUM, AFZUL } *Respondents.\**  
 MUHUL and others ...

*On appeal from the Court of the Judicial Commissioner of Oude.*

THIS was an administration suit.

The suit was brought in the Court of the Civil Judge at *Lucknow*, and involved the right to the inheritance and division of the property of *Nawab Moonuwurood Dowlah*, a Mahomedan of the *Sheah* sect, who died at *Lucknow*. The two first Respondents were the Plaintiffs and the Appellant the

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. the Lord Justice Rolt.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

29th & 30th  
 Nov., 1867.

A gift *inter vivos* of Government promissory Notes, negotiable securities, by a Father to his only Son (Mahomedans of the *Sheah* sect), accompanied by delivery of possession, and a transfer into the Son's name, without

any reservation of the dominion over the *corpus* by the Donor, except a stipulation for the right to the accruing interest on the Notes during the Donor's life, to be applied by him to certain religious and charitable purposes, is a valid gift by the Mahomedan law of the *Sheah* school, and creates a trust on the Donee to pay the interest to the Donor during his life.

Whether the non-assent of the heirs vitiates a Will of a Mahomedan made in favour of one heir to the prejudice of the other heirs. *Quære?*

The law of succession, *ab intestato*, applies only to the assets which constitute the succession.

Special leave to appeal was granted *ex parte*. The Appellant made only two of the parties to the suit Respondents. On application by another party to the suit, whose interest was affected by the appeal, the original petition for leave to appeal was ordered to be amended, and the party applying made a co-Respondent.

1867.

NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

principal Defendant. The object of the suit was for an account and division of the assets of the deceased, according to the *Sheah* school of Mahomedan law. A separate claim was set up by *Afzur Muhul*, his Widow, in respect of her dower.

The facts of the case were as follow :—

*Nawab Moonuwurood Dowlah* was for many years Prime Minister of *Oude* under the native Royal dynasty, and who was reputed to have been possessed of immense wealth, of which a great portion was invested in Promissory notes of the British Government, commonly called Company's paper, which form the securities of the public Creditors in respect of portions of the public funded debt in *India*.

These Promissory notes were negotiable instruments payable to order, and the right therein is transferable and passes by endorsement to the person to whom the same are made payable, or in whose name they happen to stand.

It appeared that about the year 1848, the *Nawab* made a gift, which was the principal question in the appeal, transferring and endorsing some of the Government Promissory notes, then belonging to him and standing in his name, into the name of the Appellant, his only Son. These transferred notes represented the aggregate amount of S. Rs. 6,74,000. In the year 1853, notice was given by the Government that the Government notes belonging to the public loan, of which the last-mentioned notes formed a part, were about to be paid off, and such notes were accordingly called in by the Government. An option was given by the Government to the holders of such notes to transfer the amount thereof into another public loan, kept in Company's Rupees, the then



currency, and bearing interest on the equivalent amount in Company's rupees at the reduced rate of four per cent. per annum. At this juncture, the Appellant exercised his right, as owner of the Government notes for S. Rs. 6,74,000 by giving the necessary orders to the Government Officer at *Calcutta* to transfer the amount standing at his credit with the Government to the other public loan bearing interest at four per cent., and effected the transfer, and of other Promissory notes in lieu of the Sicca rupee notes, equivalent to a sum of C. Rs. 7,35,300, in the name of the Appellant. It further appeared, that the Appellant had written to *Calcutta*, directing that the interest on the Government notes should be remitted to his Father, the *Nawab* at *Lucknow*, and that the interest was appropriated by his order, on account of pay of *Sayudut ool mominim* (poor Pensioners), on account of the establishment of the *Emambarah* and of the Cemetery, &c., and also for expenses at the annual Festival called the *Mohur-rum*; and that, when the accruing interest did not suffice, the *Nawab* used to advance out of his own funds, and sometimes ordered, but rarely, a portion of that money to be expended for his personal purposes. The interest used to be sent to the *Nawab* with a Letter from the Government Officer, stating it to be "to account of *Umjud Ally's* notes."

The *Nawab* also, in his lifetime, transferred to and endorsed in the name of the Respondent, *Iftikharoon-nissa Begum*, his Wife, other Government notes to the amount of Rs. 2,41,600.

In the *Hijree* year 1262, corresponding with the year 1846, C.E., the *Nawab* executed two several deeds of gift, called *Hibbanamahs*, in favour of the

1867.

NAWAB  
UMJAD  
ALLY KHAN  
v.  
MUSSUMAT  
MOHUMDEE  
BEGUM.

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

Appellant, and by which he gave certain houses, situate in *Lucknow* and elsewhere, to him absolutely, at the same time delivering over the possession of the same to the Appellant; and on the 1st of *November*, 1856, C.E., he also executed an instrument, called a *Soolenamah*, or Deed of conditional grant, for the consideration therein mentioned, in favour of the Appellant, by which he granted to him (reserving to himself only the use of the same during his life) certain *Malguzary* Villages or lands in the *Furruckabad* District, in respect of which mutation of names was effected at the time, together with houses and personal property therein described; but especially excepting from such personal property, jewels and other properties which were therein stated to have been left by the *Nawab* to his four daughters, the Respondents. And it was therein mentioned, that the Appellant had accepted the grant of the property aforesaid. Two other similar Deeds, and also called *Soolenamahs*, were executed by him, on the 1st of *June*, 1857, in favour of *Mahomed Baker Ally Khan* and *Mahomed Jafer Ally Khan*, two of the sons of the Appellant, and by which the *Nawab* granted to them respectively other real or immovable estates in *Zillah Khyrabad* and *Zillah Lucknow*, and reserving to himself the usufruct thereof during his lifetime.

In the year 1857 the Mutiny broke out over the North-western Provinces of *British India*, and on the 30th of *June* in that year the Battle of *Chinut* was fought; and on the following day, the *Nawab* being alarmed for his personal safety, fled from his House, which was looted by the Rebels, and only some property in secreted recesses escaped pillage. He took



refuge at his son-in-law's House, the Respondent, *Aboo Toorab Khan*, from whence, on the 23rd *July*, he returned to his own House. Again he attempted to fly, but was taken Prisoner and carried into the camp of the Rebels. It was alleged, that while in custody he made a Will and supplement, called *Bund*, hereafter mentioned, the validity of which was contested in the suit.

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

The British power having been re-established; on the 15th of *March*, 1858, a Proclamation was made by the Government of *India*, stating, that the British Army was in possession of *Lucknow*, and that the City was at the mercy of the British Government, after having been rebelliously defied and resisted for nine months by a mutinous soldiery, supported by the inhabitants of the City and Province of *Oude* at large. The Governor-General then proclaimed to the people of *Oude* that, with certain exceptions (therein specified), the proprietary right in the soil of the Province was confiscated to the British Government, which would dispose of that right in such manner as it may seem fitting, and directing that the *Talookdars* and Land-owners should throw themselves upon the justice and mercy of the British Government.

The *Nawab* died on the 4th of *October*, 1858, leaving him surviving one Son, the Appellant, and the four Daughters and a Widow, the Respondents, his heirs-at-law, according to the *Imamyah* Code of Mahomedan Law.

It appeared that the late *Nawab*, by a Letter, dated the 8th of *May*, 1858, addressed to the Deputy Commissioner of *Lucknow*, submitting that, as the British Government were disposed to be just and

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

equitable, they would not wish to confiscate "Houses or gardens," and referring to certain Houses and mango gardens stated to belong to him, and to be in his possession. The only garden, however, that, was mentioned was that of *Wuzeer Bagh*; but no claim for exemption or restoration of any other landed property appeared to have been made by the *Nawab* in such Letter, or otherwise, in his lifetime.

On the 5th of *May*, 1860, the British Government granted to the Appellant and his heirs the proprietary rights and interests of the estates or villages, situate in the Districts of *Lucknow*, *Seetapore*, and *Roy Bareilly*, in the Province of *Oude*, by a *Firman* of that date. The Appellant was accordingly put into the possession of the last-mentioned estates, paying the *Malguzary* reserved by the grant to the British Government.

It appeared that, as long ago as the 25th of *April*, 1844, the name of the Appellant had been, on the death of the *Nawab*, substituted for the name of the latter as proprietor of certain *Malguzary* situate in the District of *Furruckabad*, in the Books of the Collector of that District.

The Appellant obtained a certificate of administration of his Father's estate under Act, No. XXVII. of 1860, subject to the obligation to render accounts.

The Respondents, *Mussumat Mohumdee Begum* and *Mussumat Nawab Begum*; two of the Appellant's Sisters, claimed to be associated with him in the administration of the estate; and in a summary proceeding before the Civil Judge on the 28th of *April*, 1860, the Appellant admitted their rights as co-heirs with others, but submitted, that they should be post-



poned to the payment of debts and dower to the Widow, and satisfaction of dower under the alleged Will, which was, however, contested by these last-mentioned Respondents.

The certificate of administration was withdrawn on account of some irregularity in its issue, and another was subsequently issued to the Appellant, under the above Act, on the expressed condition of his rendering a full account or inventory of the entire property, including not only the property of the *Nawab* admitted by him to be divisible, but also that which had been especially given to himself, as before stated; also on condition that he would distribute the assets regarding the divisibility of which there was no dispute among the parties. The Respondents objected to this certificate being granted without taking security from the Appellant, which objection was overruled by the Judicial Commissioner, who left the Objectors to a regular suit to recover such portion of the estate of the *Nawab* as they claimed.

Accordingly, on the 18th of *December*, 1860, the suit in which the present appeal has arisen was commenced by the two first-mentioned Respondents, the daughters of the late *Nawab*, filing a plaint in the Civil Court of *Lucknow* against the Appellant and other persons. The claim set up by the plaint was founded on their hereditary right and title, which they sought to establish, as joint heirs, to a two *annas* and two *pice* share each (the whole into sixteen *annas* being nominally divided) in the whole of the movable and immovable estate and property left by the *Nawab*, taken possession of by the Appellant and the Respondent, *Aboo Toorab Khan*; the late *Nawab*

1867.

NAWAB  
UMJAD  
ALLY KHAN

v.  
MUSSUMAT  
MOHUMDEE  
BEGUM.

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

having, as it was alleged, died without executing any Will, *Soolenamah*, or other document affecting their title. The plaint further claimed proprietary possession of the villages situate in the Districts of *Seetapore*, *Ray Bareilly*, *Lucknow*, and other places in the Province of *Oude*, as also of the villages in the *Furruckabad* District, of the Houses lying in *Lucknow*, *Furruckabad*, and *Cawnpore*, and of other immovable property lying in the British Territory; also interest on the Government Promissory notes, and the latter themselves, and the interest of the Government notes invested for the maintenance of the *Hoosainabad Emambarah*, and all in proportion to their shares. The plaint concluded, by alleging the falsity of the several documents and the Will, which latter the Plaintiffs alleged was a forgery; and also averred that the late *Nawab* was the real owner of the Government Promissory notes for Rs. 7,35,300 standing in the Appellant's name, and of those to the value of Rs. 2,41,600 standing in the name of the Respondent, *Afzul Muhul*, the Widow; and that she and the Appellant were merely *ism furzee* (nominal) holders; that *Hukeem Meer Ally*, another of the Respondents, was a mere nominal holder of the landed estate; and that the Respondent, *Afzul Muhul*, the Widow, possessed no right to the dower claimed by her to the amount of Rs. 4,50,000.

On the 10th of *June*, 1861, a written statement, purporting to embody what had been urged verbally in support of the Plaintiff's claim, was filed by them in the Civil Court. In that document a claim was for the first time set up to the immovable estate confiscated and afterwards granted by the Government to the Appellant, under the before-mentioned *Firman*,



submitting that, as there was no new conveyance by his Father to him after the confiscation, the title under the *Soolenamah* failed; and as he could only be regarded as taking the grant from Government as the sole male representative of the late *Nawab*, he was bound to make a suitable provision for his co-heirs, as was customary under the law of primogeniture in the Province. They admitted, that they had received the sum of Rs. 2,68,404. 4a. 4p., but claimed to receive more from the estate of the deceased *Nawab*, and they alleged that the following constituted part of his estate :—

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

|                                                                                                                                                                                                                                                                                   | RS.      | A. |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|----|
| 1. <i>Ismfurzee</i> notes held in name of Defendant                                                                                                                                                                                                                               | 7,35,300 | 0  |
| 2. <i>Ism furzee</i> notes held in name of the Widow of deceased                                                                                                                                                                                                                  | 2,41,600 | 0  |
| 3. Sum paid to <i>Ifhtikharoonissa Begum</i> , alias <i>Ufzul Muhul</i> , the Widow, being over and above of what is acknowledged by the Defendant to be her one-eighth of the divisible estate                                                                                   | 4,50,000 | 0  |
| 4. <i>Talooks</i> held <i>ism furzee</i> , in possession of <i>Umjud Ally</i> , under false deed of gift under the name of deceased (deed being in favour of <i>Umjud</i> ) the genuineness of which deed is denied. Total <i>malguzary</i> of the real estate (approximately) :— |          |    |
| In <i>Oudh</i> , 1 per an.,                                                                                                                                                                                                                                                       | 55,000   |    |
| In <i>Futtehgurh</i> , about                                                                                                                                                                                                                                                      | 5,000    |    |

60,000 0

1867.

NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

N. B. Besides Houses and *godowns* RS. A.  
 in both Provinces.

5. *Rud muzalim* (for the benefit of deceased's soul), amount kept under this head by *Nawab Umjud Ally*, as provided for by the alleged Will ... 5,43,303 10
6. *Waseeka*, a portion of the *Hosanebad* trust, paid monthly to the deceased, and claimed to be heritable.
7. Household property belonging to the estate, and jewellery to an immense amount, alleged to have been lost in the loot.

An account of the division of Government notes was filed by the Appellant, by which it appeared that he had delivered, according to the alleged Will, to the Respondent, *Afzul Muhul*, the Widow, in payment and satisfaction of her dower, Government notes to the amount of Rs. 4,50,000; that he had set apart and allotted to the trust *Rud Muzalim* other Government notes to the amount of Rs. 5,43,333; and had paid out of the residuary estate to the Widow her one-eighth share, Rs. 1,12,500, as one of the co-heirs; to the two Plaintiffs and their two Sisters, the Respondents above named, their one-eighth share each; and to himself, (the Appellant), being a Son, his double share.

Issues were recorded and witnesses examined as to the validity of the alleged Will and supplement, before Mr. *C. G. Fraser*, the Civil Judge of *Lucknow*, and on the 31st of *October*, 1861, he decreed that the Will and supplement were proved, and together constituted the Will and Testament of the



deceased *Nawab* ; that the gift of Government notes of Rs. 7,35,000 to the Appellant was a good and valid gift, and that they were his property ; that the gift of Government notes for Rs. 2,41,600 to the Widow was also valid, and given to her as part of her dower claim ; and that the other notes for Rs. 4,50,000, not transferred to her in the *Nawab's* lifetime, were rightly endorsed, and given to her since his death, by the Appellant, as Administrator, in discharge of and full payment of her claim for dower under her deed of dower, which he upheld ; that the sum of Rs. 5,43,300 was properly settled as a trust fund (*Rud Musalim*), by the Will, and that by the creation of this fund the Appellant was the greatest loser, as it reduced the divisible estate. Then, as to the immovable property referred to in the deeds called *Hibbeenamah* and *Soolenamah*, the decree declared, that they also were proved ; and that the *Malguzary* property in *Zillah Lucknow* was, moreover, covered by the Government grant in favour of the Appellant, as well as the villages held by his Son under deed, and situate in *Khyrabad*, *Zillah Seetapore*, which were also conferred on the Appellant by the Government grant ; and that the titles conferred by the previous Deeds were in fact wholly set aside, and a new title conferred ; and the decree further declared, that the garden, *Wuzeer Bagh*, was divisible property, subject to deduction for any sums paid by the Appellant for its restoration ; that the sum still divisible among the heirs was Rs. 28,448. oa. 2p. ; and lastly, as to the jewellery, it was declared, that there was nothing to recover except a lot in Court secured by the Respondent, *Aboo Toorab Khan*, by purchase.

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

1867.

NAWAB  
UMJAD  
ALLY KHAN

7.  
MUSSUMAT  
MOHUMDEE  
BEGUM.

The Plaintiffs, being dissatisfied with this decree, appealed against the same to the Judicial Commissioner of *Oude*.

The Respondent, *Afzul Muhul*, also presented a petition of appeal to the Judicial Commissioner, on the ground that the decree dismissed her claim on account of dower.

The hearing of these appeals took place before Mr. *G. Campbell*, the Judicial Commissioner, and on the 19th of *April*, 1862, he delivered one judgment and decree in both appeals. In that judgment he held, that he entirely concurred with the Civil Judge in rejecting the Widow's claim to dower in addition to what she had received, and accordingly dismissed her appeal. In respect of the other appeal, the decree affirmed the decree of the Civil Judge, so far as related to the payment by the Appellant, as Administrator, according to the Will, to the Respondent, as Widow, of the Government notes for Rs. 4,50,000, in satisfaction of her dower. The judgment, in considering and treating of the contest on the genuineness of the Will and Supplement, and on the trust fund called *Rud Muzalim*, therein mentioned, proceeded as follows:—"I now come to the distribution of the Government paper, which is in fact the main subject in suit, and regarding which there has been the contest of the genuineness or otherwise of what is called the Will, or rather the Supplement to the Will. I should be very sorry if the disposal of this great property turned upon the validity of this unsigned paper. Although as between the present parties the internal evidence would, I think, be quite in its favour, 'it must no doubt be remembered that it was originally produced in opposition to the claims



of *Kaim Ally*, by whom the present Defendants were then sufficiently pressed, and whose case it was very much calculated to rebut. Still, as a mere question of weighing opposing probabilities and improbabilities, I might respect the finding of the Judge who so fully tried the issue ; but while I am sure that I could have no better decision of the facts than Mr. *Fraser's*, I must correct his law on some very important points ; and the first of these is this, that in putting the alleged Will in issue he seems to have altogether forgotten one of the plainest rules of Mahomedan Law, viz., that no legacy can be left to one of the heirs without the consent of the other heirs ; that is a rule found in every Text-book. The only doubt might be that as these Books are principally taken from *Soonee* law, there might be some difference in *Sheah* law. I have, however, plainly put the point to the parties, and there has been no attempt to dispute this view of the law. It may, therefore, be considered settled ; and I have, therefore, all along intimated that I thought that as between the heirs nothing could turn upon the Will. In fact, the document itself does not, as between them, profess to be a Will at all. It merely recites certain distributions said to have been already made, and assigns a third of the remainder to the religious and charitable fund called the '*Rud Muzalim.*' The Plaintiffs admit that there was an assignment to this of at least as large amount and of older date. They would only fix the assignment on another part of the property which is claimed by *Nawab Umjud Ally*, but that the fund is to come out of the estate is admitted on all hands, and that need not be put in issue. I, therefore, declare that, so much as has been admitted by

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDER  
 BEGUM.

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM

the Administrator, not exceeding one-third of the whole net estate (as eventually settled), belongs to the *Rud Muzalim* fund; and I strike out of the case the issue respecting the Will, because nothing really turns upon that alone. I will only allow the paper to stand, as found to be more probably true than false, so far as it may to some extent come in as incidental evidence on the other issues. With respect to the *Rud Muzalim* fund, I think it must be understood that *Nawab Umjud Ally* cannot take any beneficial interest in it to the exclusion of the other heirs. It must be managed by an individual or individuals strictly as Trustees. The eldest male descendant of the Founder is clearly a proper person to hold the office of Trustee. I, therefore, declare that *Nawab Amjud Ally*, and after him the eldest of the line of the descendants on the male line from *Nawab Moonurood Dowlah*, if sane, fit, and of age, shall be a Trustee, and that conjoined with him in that office shall be *Syud Mahomed Mujtuhid-ul-Asur*, and after him some other fit person of a religious character to be nominated by the Court; and that if the Trustees accept the office, they shall within a month submit for the approval of the Court a scheme for the governance of the fund." The judgment then proceeded to deal with the question and issue involving the Appellant's right to the Government notes for Rs. 7,35,500, under gift from the late *Nawab*, as follows:—" *Nawab Umjud Ally*, the Defendant, contends, that the property was fully and legally transferred to him, and that the enjoyment of the proceeds by his Father was by his leave and consent, and that such enjoyment does not affect the legal possession nor invalidate the gift. In a case of such importance it is im-



possible to place any faith in any Mahomedan legal opinion. The *Mujtahid*, the principal authority here, has from the first, by improperly attesting the Will after the death of *Nawab Moonowurood Dowlah*, placed himself in the position of a partisan, and I have not thought that we could with any advantage accept anything from him. *Lucknow* abounding in Mahomedan Lawyers, I have thought it better to give the parties full opportunity of producing their authorities. The result has been very unsatisfactory. The Texts produced on both sides from notable and acknowledged Text-books are obscure in the extreme, and none of them can be said fully to meet the case ; other quotations subsequently produced are from Books of a local character and little authority. In fact, the Mahomedan Law did not contemplate Government securities held by public registry, and Government Agents holding securities in the name of one man, and remitting the interest to another. They seem to assume that possession must be simple possession, and they constantly require possession as a condition of gift. For the rest, it has been said that the native Lawyers can produce authority for any opinion. I believe that it is equally unsafe to accept the *dicta* of particular Lawyers, and difficult to settle a complicated case by comparison of authorities. The proper course then in such cases seems to me to be, to accept the broad and acknowledged principles of native law, and apply them by our own reason to the case. That is the course which I must follow in this case. In this light the question seems to me to be whether, in transferring this property to the Son while the Father retained the enjoyment of the proceeds during his life, the parties did or did


1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

not act up to the principles and spirit of the Mahomedan Law. To my mind it is perfectly clear that they did not. They altogether evaded the law, which requires real possession as the condition of a gift, and prevents a man from enjoying property while he lived, and then dividing it unequally among his heirs at his death. Such an unequal division the Mahomedan Law thinks fit to forbid, and in that prohibition it is not singular; the laws of other Countries have done the same thing. There is, therefore, nothing in the Law itself which would prevent our giving effect to it. We are bound to do so, and if the Law is so, it is much better that it should be made clear, and honestly acted upon, and that it should be left to the Legislature to alter it, if it be deemed fitting to do so, than that we should allow it to be evaded by subterfuges. I, therefore, think that the first principles of Mahomedan Law are involved in this case. It is evident that if the disposition hold good, the effect is that, in practice, *Nawab Moonowurood Dowlah*, having enjoyed his fortune to the day of his death, has left a large share of it to one child, and a much smaller share to the other children, contrary to the main principles of the Mahomedan Law. Upon the party claiming under abnormal disposition lies the *onus* of proving a case to justify the evasion. I do not think he has done so; I do not find any clear legal authorities to justify the proceeding; nor can I find any precedents for it among the decisions of British Courts. The nearest case is one between Husband and Wife; but then the Donee seems unquestionably for a time to have exercised dominion, and the case between Husband and Wife is acknowledged in the Text-books to be peculiar. I cannot then find any-



thing to justify the evasion of the Law which is attempted. There is another consideration which may have some weight if the Law is to be evaded. I think it very much against public policy that any encouragement should be given to evading it by the demoralizing practice of what is called '*ismfurzee*,' or 'false name' holding—that is, the nominal holding by one person for the real benefit of another. I am sorry to say that this practice is well known in *Lucknow*; and there is clear evidence in this case that in other instances *Nawab Moonowurood Dowlah* adopted it, having held estates in the name of his creatures. If my view of it is correct, the transaction which is the subject of the present case is of this nature. In order to evade the Law, Father and Son agreed that there should be a transfer to the name of the Son, but that the Father should continue to enjoy the benefits. I would not sanction any evasion of the Law, unsupported by undoubted authority, and least of all would I sanction an evasion by what I consider to be an '*ismfurzee*' transaction. I had then formed a strong opinion that this transfer could not be maintained. Just when I was near the conclusion of the case, I received an answer of the *Calcutta* Law Officer to a suppositions case which I had put to him, to see if he, among others, could throw any light on the matter (a). His opinion seems to go contrary to

1867.  
  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

(a) The *Futwa* of the *Calcutta* Law Officer referred to in the above judgment was as follows :—"There can be no doubt as to the gift being good and valid. The making over the property by the Donor is proved both by the gift and the registraion of the name of the Donee as proprietor; and the Donee directing the Agent to send the net proceeds to his Father, shows that he had obtained possession. The receipt of the proceeds by the Father cannot, therefore, invalidate the gift."

1867.

NAWAB  
UMJAD  
ALLY KHAN  
v.  
MUSSUMAT  
MOHUMDEE  
BEGUM.

mine, and I have given it due consideration. But after all he quotes no precedents or authorities; it is a bare nude opinion, and I do not concur in his argument, which is, that the usufruct being paid to the Donor by the leave and order of the Donee, the condition of possession is not vitiated. He doubtless places the case in the light in which it can be best argued on that side. Setting aside the point made by the Plaintiffs, that there was no gift, but only a trust (for the *Rud Muzalim*), it might be possible that the argument might avail, if the Donee, after for some time exercising real dominion and active possession, had ordered the proceeds to be paid to the Donor, or if, instead of the whole proceeds going to the Donor, and an allowance being made by him to the Donee, the Donee had retained as much as was required for his own expenses, and paid the rest to the Donor. But in this case the gist of the matter seems to lie in this, that there is every reason to suppose that the transfer of the property to the name of the Donee, and the arrangement that the Donor should continue to receive the whole of the proceeds, were coincident in point of time, and being so that the two transactions were correlative, and were in fact but parts of one bargain. In fact, it seems to me indisputable, that the Father transferred the property to the Son on the express condition and understanding that the Father should receive the usufruct during his life. That was, I think, *ab initio*, a condition of the transfer; and I have a clear and strong opinion, that such a condition violates the Mahomedan Law of gifts, and renders the transfer inoperative as a gift to the transferee, and invalid as against the heirs claiming under the law of inheritance and bequest.



On these grounds, then, I declare that the disputed notes for Rs. 7,35,300 is part of the divisible estate of *Nawab Moonowurood Dowlah*, and that *Nawab Umjud Ally* must account for them to the heirs, with interest. Considering that there was reasonable and almost necessary ground for litigation in the manner of the disposition made by the Father, I think it proper that, after being carefully taxed, the costs of both parties in the case in which *Mohumdee Begum* and *Nawab Begum* are Plaintiffs should be paid out of the estate. I have reserved the decision regarding the landed property, because Government has intimated its intention to bring before the Legislature an Act for altering the jurisdiction of the Courts in respect to landed property in *Oude*; and I think it desirable to see, whether it will retrospectively affect any decision passed in this case; but in postponing so much of the case, I do so without prejudice to the interests of the parties who have carried it through the Civil Courts; and if on the publication of the Act it appears that it will not have retrospective effect, I will decide the remaining issues."

The Appellant applied to the Judicial Committee for leave to appeal from this decree. He made only the first two Respondents parties to the petition. By an Order in Council, dated the 9th of *January*, 1863, special leave to appeal against the decree of the Judicial Commissioner of *Oude* was granted.

Before the hearing of the appeal took place, *Afzul Muhul*, the Widow, applied to have the appeal dismissed for irregularity, or that it might stand over to amend the petition of appeal, and that she might be admitted as a co-Respondent, to appear and be heard, also for liberty to appeal from so much of the

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

26th Nov.  
 1867.\*

decree of the Judicial Commissioner as affected her rights as the *Nawab's* Widow. Leave was granted for her to appear and be heard, so far as her rights were concerned, and if necessary to appeal from the Judicial Commissioner's decree.

The appeal now came on for hearing.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

By the Mahomedan Law of the *Sheah* school, a gift to an heir followed by possession is valid: *Shurayaool Islam*, pp. 242, 252-3; *Baillie's* "Dig. of *Moohumudan* Law," pp. 507, 522; the *Hedaya*, Vol. III. B. XXX. ch. 1, title "Gifts," p. 294. A gift is constituted by declaration and acceptance; the *Hedaya*, Vol. III. p. 673. Therefore, the gift of the Government promissory notes for Rs. 7,35,300 by the Appellant's Father to him was valid. Such notes were negotiable securities transferred into the Appellant's own name, and such transfer having been accompanied by the delivery of possession to him, all control and power over the same was giving up by the Donor. The directions by the Appellant to his Agent, to pay the interest to his Father, to be appropriated by him to certain religious and charitable purposes, as well as his act of converting the moneys secured by the first notes into other notes belonging to a distinct Government loan, were obvious acts of ownership, and could not affect or invalidate the gift. Even if the gift was invalid, the decree of the Judicial Commissioner was wrong. First, the

Present :—Members of the *Judicial Committee* :—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Assessor :—The Right Hon. Sir Lawrence Peel.



Will and supplement was established by evidence ; secondly, the Judge was not justified in appointing a Stranger to act as a Trustee under the Will and the supplement of the Appellant's Father, in conjunction with the Appellant in his office of Trustee of the family religious and charitable fund, called "*Rud Muzalim* ;" thirdly, the Judicial Commissioner ought to have declared that the Government promissory notes, the subject of the gift, passed by the Will and supplement as a specific bequest to the Appellant, inasmuch as he held, that one-third of the estate of the Testator remained unappropriated or undisposed of at the time of his death ; lastly, he was not justified in refusing, on the hearing of the appeal, to adjudicate upon the right of the Appellant and the other persons claiming in respect of the landed property in question in the suit, on the ground stated by him, and, on the contrary, ought to have established the right of the Appellant.

Mr. J. Bell, for the two first Respondents :—

First, upon the evidence as to the *factum* of the alleged Will and schedule of *Nawab Moonnoowurood Dowlah*, the Court could not hold that it constituted a valid Will. Even if the evidence of the *factum* of these papers was in favour of their having been duly executed, still the provisions relied upon by the Appellant could not, according to the principles of Mahomedan Law, be carried out, inasmuch as no legacy can be left to one heir without the consent of all the others, which requirement of law in this case was wanting.

Secondly, as to the *Rud Muzalim* fund, it was clearly a trust fund only, out of which the Appellant could take no beneficial interest to the exclusion of

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

1867.

NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

the other heirs : *Varden Seth Sam v. Luckpathy Royjee Lallah (a)* ; and the decision of the Judicial Commissioner, in appointing the Appellant and *Syud Mahomed Mujtuhid-ul Asur* as Trustees for the administration of the trust, was in accordance with the principles of the Mahomedan Law, as administered in Courts in *India*. As to the transfer of the Government notes, I submit, that there was no such transfer as was sufficient by the Mahomedan Law to vest the same absolutely in the Appellant, it being found as a fact by the Court of first instance, which finding was confirmed by the Judicial Commissioner, that *Nawab Moonoowurood Dowlah* retained the possessory right and usufruct of those securities until his death. Now, according to the Mahomedan Law, any beneficial interest reserved in the thing given, to continue during the lifetime of the Donor, is an invalid gift, and against the policy of the Mahomedan Law of the *Sheah* school: *Baillie's "Dig. of Moohummudan Law,"* p. 534. Relinquishment of possession by the Donor and immediate seizen by the Donee of the entire subject of the gift is absolutely necessary: *Jeswunt Sing-jee Ubby Sing-jee v. Jet Sing-jee Ubby Sing-jee (b)* ; *Jafier Khan v. Hubshee Bebee (c)* ; *Macnaghten "On Moohummadan Law."* Ch. V. p. 50 ; *ib.* Prec. of Gifts, Case, XVIII. p. 222. If the statement in the schedule attached to the alleged Will is to be relied upon as a direction in a valid testamentary paper, it can only be regarded as the completion of an imperfect gift by a testamentary direction, and would, therefore, require the consent of the other heirs to make it valid. The decision of the Judicial Commissioner is in accordance with the justice of the case, save so far as it deprived these Respon-

(a) 9 Moore's Ind. App. Cases, 304.

(b) 3 Moore's Ind. App. Cases, 245-7.

(c) 1 Ben. Sud. Dew. Rep. 12.



dents of a share in the specific articles of personalty to which they are entitled, for although the Mahomedan Law, according to the *Sheah* doctrines, recognizes a Son's right to receive his Father's sword, *Koran*, wearing apparel, and ring, yet there is no authority to be found that he shall retain possession of Elephants or Guns, or implements of warfare or the chase, which articles, on the death of the Appellant's Father, should have been valued, and the value distributed in the same proportion as other property.

Thirdly, it is submitted that the discretion exercised by the Judicial Commissioner in refusing to adjudicate, and reserving his decision with respect to the real estate of the deceased *Nawab*, cannot now be questioned, as the Appellant is restricted to the extent of the relief he asked for, and which was granted by the special leave given him by this Tribunal to appeal, which is confined to the case of the first two Respondents, whom he alone made Respondents, and does not affect the Widow or other Respondents interested in the residue of the general estate.

Lastly, it is submitted, that there was no valid forfeiture by the Governor-General's proclamation, of the estate of *Nawab Moonoowurood Dowlah*, arising out of the rebellion in *Oude*, and the *Sunnud* or *Firman* by the British Government, recognizing the Appellant's right, does not affect the case; but as that is an act of State, a Municipal Court probably cannot go into the question of its validity.

Mr. *Ince*, for the Widow, *Afzul Muhul*,

Contended, that by Mahomedan Law, this Respondent, as Widow of *Nawab Moonoowurood Dowlah*, was entitled to one-eighth of the Government secu-

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

Advocate High Court  
 Jammu & Kashmir  
 Srinagar.

G. N. Datta

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

rities as dower, according to the settlement made on her, as the gift to the Appellant was void, the Donor continuing to have an interest, it being essential by that Law that the gift should be actual and potential to the Donee, without any reservation of interest in the Donor, which was not the case in the gift to her by the *Nawab*. He referred to *Baillie's* "Dig. of Moohumudan Law," p. 508; *Macnaghten* "On Moohumadan Law," Ch. V. p. 50; and "Prec. of Inheritance," Cases XLII. pp. 114, 129.

Judgment, having been reserved, was delivered by

The Right Hon. Sir EDWARD V. WILLIAMS.

20th Dec.,  
 1867.

This is an appeal, under an Order made on a special application to Her Majesty, for leave to appeal against so much of the decree of Mr. *Campbell*, made by him when Judicial Commissioner of *Oude*, as reverses or varies a decree of Mr. *Fraser*, the Civil Judge of *Lucknow*, in favour of the Appellant. The suit in which Mr. *Fraser's* decree was made was brought by the Respondents, *Mohumdee Begum* and *Nawab Begum*, as Daughters and co-heirs of the deceased *Nawab*, against the Appellant as the Son and the Administrator of his Father's estate, under Act, No. XXVII. of 1860, against the Widow of their Father and two Sisters of the Plaintiff, also co-heirs; and, lastly, against certain other persons described as nominal Defendants whom it is unnecessary here to name or further to describe.

The suit was in the nature of an administration suit; it sought a discovery of a portion of the assets alleged to be withheld, and an account, and a division of the assets amongst the heirs according to the Mahomedan Law. The deceased and his family were



Mahomedans, and followers of the *Sheah* school. The Widow of the deceased instituted also a distinct and separate suit against the heirs, claiming her dower according to a settlement of it upon her by her Husband, and claiming, in addition to it, a large sum of money by gift from her Husband during his lifetime. Her claim to one-eighth of the clear assets seems not to have been disputed. The Appellant claimed a large portion of the property, consisting of Promissory notes of the Government, commonly called Company's paper, amounting to Rs. 7,35,300, as his property by gift from his Father in the lifetime of the latter, the validity of which gift was disputed by the Respondents, the Plaintiffs in the suit, as well as by the Widow, a co-Defendant.

Mr. *Fraser's* decree established this gift in favour of the Appellant. The decree of Mr. *Campbell* reversed that portion of Mr. *Fraser's* decree, and declared the gift invalid according to Mahomedan Law. The Appellant claimed also against the co-heirs, the immovable property described in the suit. Of this a large proportion was situate in *Oude*, and was claimed by him under a *Firman* from the Government of *India*, granting it to him exclusively as property which had been declared forfeited, and to be the property of the State, by Lord *Canning's* Proclamation on the suppression of the rebellion in *Oude*; and a smaller portion, being land situate in *Furruckabad*, was claimed by him under a certain instrument of conveyance from his Father, termed a *soolehnameh*. This property was adjudged to him by Mr. *Fraser's* decree. Mr. *Campbell* did not adjudicate upon that part of Mr. *Fraser's* decree relating to the above-mentioned immovable property, other-

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

1867.

NAWAB  
UMJAD  
ALLY KHAN  
v.  
MUSSUMAT  
MOHUMDEE  
BEGUM.

wise than by declaring his intention to reserve the consideration of those issues to a further time, for the reason assigned in the concluding paragraph of his judgment. The Appellant treats this reservation of judgment, as a variation by Mr. *Campbell* of Mr. *Fraser's* decree, and makes the propriety of it a ground of appeal. The Respondents, on the other hand, contend that, as a mere reservation of a judgment, on appeal, by the appellate Court, is neither a reversal nor a variation of a decree appealed against, the Appellant is not entitled to insist on this part of Mr. *Campbell's* judgment as a grievance against which he has been permitted to appeal. The appeal is brought not as of right, but by special leave, and in the petition on which leave to appeal was granted, the Appellant named only the two Respondents, who were Plaintiffs in the suit; but the Appellant has, nevertheless, now named all the parties interested in the general estate, including the Widow, as Respondents.

Application was made, on the part of the Widow, to their Lordships, on the first day of their sittings, to dismiss or suspend the hearing of the appeal, on the ground of irregularity; her Counsel stated that the Widow had not appealed against the decrees, affecting her claims to the sum disallowed as a gift, being, on the whole, content to take her portion of the seven *lacs* which, by Mr. *Campbell's* decree, fell into the residuary estate; but that, if this appeal succeeded, she would be prejudiced thereby to so large an extent that she should then desire to appeal against the disallowance of a part of her claim by the decrees of the two Courts. Leave was given to her to appeal against that portion of the decrees, and she has been heard by her Counsel as a party



Respondent on the present appeal. The decision of their Lordships on the present appeal will be without prejudice to her rights in her own appeal, if preferred, as respects the claims disallowed her by those decrees ; in other respects it will conclude her rights, in the ordinary way, as a party Respondent to this appeal.

The matters to be determined on this appeal are three in number, and are :—First, the validity of the gift to the Appellant of the Company's Paper, amounting to Rs. 7,35,300 ; secondly, the appointment of a Stranger to be and act as co-Trustee with the Appellant in the trust as to the family, religious, or charitable fund called *Rud Muzalim*, and the direction to settle a scheme for the administration of that fund ; and, thirdly, the reservation of his judgment, indefinitely, by the Judicial Commissioner, on the right of the Appellant, as declared by Mr. *Fraser* in his decree, in respect of the landed property adjudged to the Appellant by that last-mentioned decision.

The first in order of these matters involves an important point of Mahomedan Law relating to gifts, *inter vivos*.

If the gift be sustained as a valid gift, *inter vivos*, it will be unnecessary to review the evidence as the genuineness of certain documents propounded by the Appellant, and said to constitute a valid testament by the Mahomedan Law, or to consider in any way the validity or effect of those documents.

The effect of the non-assent of co-heirs to a bequest to an heir by a Mahomedan of the *Sheah* sect becomes also immaterial as a subject of inquiry here, if the gift be valid as a gift *inter vivos*.

Before the validity of this gift, as one *inter vivos*, is determined, it must first be considered by their

1867.

NAWAB  
UMJAD  
ALLY KHAN  
v.  
MUSSUMAT  
MOHUMDEE  
BEGUM.

1867.

NAWAB  
UMJAD  
ALLY KHAN  
v.  
MUSSUMAT  
MOHUMDEE  
BEGUM.

Lordships what the real nature of the transfer was. The legal title in the Promissory notes was undoubtedly in the Appellant, in his Father's lifetime, by virtue of an act of the Father.

But though the transfer of a legal title will satisfy that provision of the Mahomedan Law which relates to the point of seizin, in its legal and technical sense, yet that alone will not suffice where no intention exists to transfer the beneficial ownership, either present or future. The facts relating to the gift have been most carefully investigated by Mr. *Fraser*, the Civil Judge. The Judicial Commissioner, paying a just tribute of commendation to Mr. *Fraser* on his accurate investigation of the facts, expresses no dissent from his conclusion as to them, but reverses his decision as to this gift as erroneous in point of law. Mr. *Fraser's* observations as to the mode of dealing amongst Natives living amongst themselves as a family, in a state of family union, and dealing in this state with the proceeds of property standing in the names of separate members of the family, to whom it has been transferred by the parent and head of the family, and on the deference to his wishes and arrangements, and acquiescence in them commonly exhibited, are forcible as arguments to exculde the notion of fraudulent concealment or design in a transfer circumstanced as the present. They strengthen the probability of an intended transfer of property in the lifetime of the Donor, with a reservation of the use or proceeds of the money transferred during the lifetime of the Donor only.

In consequence of the tendency amongst natives to disguise their ownership under *Benamee* transfers of property, a natural suspicion arises often that such is



the design when the transaction is really fair and open, and the apparent and real title are entirely consistent. The transaction questioned in this case, though between Natives, differs in no respect as to the manner of dealing with the property in question (Company's paper in the hands of the Government Agent at *Calcutta* at the time of and after the gift), from the mode in which an European Father and Son, designing to make between themselves a similar disposition of the like property, giving the paper to the Son with a reservation of the interest to the Father for life, might have dealt with it so as completely to effectuate their intention. There is no evidence of any attempt or design to conceal from the Government Agent, or from others, the origin of the property, its source, transfer, or continuing state of enjoyment. Mr. *Fraser* accordingly, and very reasonably, negatives any fraud in the transaction as to these notes, and Mr. *Campbell*, though he treats the case as one undeserving of support in a Court of Justice, proceeds not on actual fraud, but on his views of the policy of the law, and treats the transaction as fraudulent in contemplation of law, and done in evasion of its provisions, which limit the testamentary power of a Mahomedan, and aim in some degree at equality of division amongst the descendants *ab intestato*.

Everything which took place in respect of these notes at the Government Agent's Office was perfectly consistent with the Appellant's real title in them. It is true his case is stated higher in his pleadings than the real title warrants; but the case, as stated, includes the real title, and is only the common error which is so frequently observed in

1867.

NAWAB  
UMJAD  
ALLY KHAN

v.  
MUSSUMAT  
MOHUMDEE  
BEGUM.

1867.

NAWAB  
UMJAD  
ALLY KHAN

vs.  
MUSSUMAT  
MOHUMDEE  
BEGUM.

the cases of Natives in *India*, where their legal advisers, from ignorance or foolish craft, misstate a good case, and place it on false grounds. This was not an absolute transfer of the whole property, including all future interest, beneficial as well as legal; nor was it a *Benanee* transaction. A mere *Benamee*, or *ism furzee* title, is simply a nominal title without interest. It may, or may not, be fraudulent in design. Such a disposition by a Donor, where the transfer of the property, from its very nature, effected a legal transfer of it, would be simply the creation of a trust in his favour, and would, of course, leave the disposition *ab intestato* undisturbed. But such was not the intention here, and such is not the nature of the disposition. The object of the disposition is correctly stated by Mr. *Fraser* to have been to give the Son a larger share of the Father's property than would come to him by succession *ab intestato*. Mr. *Campbell*, the Judicial Commissioner, treats that intention and act as evasive of the testamentary law of Mahomedans, and as inconsistent with their law of gifts. Upon the first ground of decision it is to be observed, that in the absence of immoral or illegal purposes accompanying and prompting an act of disposition of property, a disposition which the law admits, cannot be evasive of the law. The law of succession *ab intestato* applies only to the assets which constitute the succession. If the law allow alienation so as to defeat a succession, the question, whether a subject of property is part of the assets, or not, raises simply the question, whether the transfer of it is legally complete. The design to alter, and so in one sense to defeat, the disposition of property, is simply a design to conform to the law, whilst working out an unfor-



bidden design. The other view of the subject, that this is an incomplete gift by the Mahomedan Law, is one which presents more difficulty, and will be presently considered. On moral grounds the transaction cannot be impeached. It seems to have proceeded simply from the cause assigned for it in Mr. *Fraser's* judgment, viz., a desire to maintain the dignity of the eldest branch of the family; neither can the policy of the law be invoked, for the reason above assigned, that the policy of the law is to be collected from its whole body, and not from a detached portion of it; so that if the law suffers a Father by an act, *inter vivos*, to alter his succession, his exercise of that power cannot be deemed a fraud upon the law.

It remains to be considered whether a real transfer of property by a Donor in his lifetime under the Mahomedan Law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his lifetime, is an incomplete gift by the Mahomedan Law. The text of the *Hedāya* seems to include the very proposition and to negative it. The thing to be returned is not identical, but something different. See *Hedāya*, tit. "Gifts," Vol. III. Book XXX. p. 294, where the objection being raised that a participation of property in the thing given invalidates a gift, the answer is, "The Donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use [of the whole indivisible article] for his gift related to the substance of the article, not to the use of it." Again, if the agreement for the reservation of the interest to the Father for his life be treated as a

1867.

NAWAB  
UMJAD  
ALLY KHAN

7.  
MUSSUMAT  
MOHUMDEE  
BEGUM.

1867.

NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

repugnant condition, repugnant to the whole enjoyment by the donee, here the Mahomedan Law defeats not the grant, but the condition. *Hedaya*, tit. "Gifts," Vol. III. Book XXX. p. 307. But as this arrangement between the Father and the Son is founded on a valid consideration, the Son's undertaking is valid, and could be enforced against him in the Courts of *India* as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated. The intention of the parties, therefore, is not found to violate any provision of the *Hedaya*, and the transfer is complete. The Mahomedan Law authority whom Mr. *Campbell* consulted, supported it. His opinion is treated somewhat lightly as a nude opinion, unsupported by authority; but it is to be observed, that unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties.

The second matter of complaint is the appointment of a co-trustee. The ground taken on the argument of the incompatibility of such an association with the *status* and dignity of the Appellant, and with family usage, seems to their Lordships to be displaced by one of the documents with the Appellant propounded and used before the Court, which does associate a co-trustee with him. As against the Appellant the appointment of a co-trustee will justly give effect to what he alleges to have been the intention of the founder of the trust. The discretion of the Judicial Commissioner as to the person appointed is a matter with which their Lordships are indisposed to interfere, and no sufficient reasons are advanced to control it in this instance. His



direction as to a scheme for the administration of this trust seems to their Lordships reasonable.

The third point requires a more detailed statement of the grounds on which their Lordships think, that the decision of Mr. *Fraser* may be affirmed here, rather than by the Judicial Commissioner acting under their Lordships' expression of opinion. As it is clear, that the Appellant meant to include this part of the judgment in his appeal, any merely verbal insufficiency in his grounds of complaint, or of the Order made thereon, might be removed by leave given to renew and extend the application to appeal, so as to cover and remove a mere technical defect. But as the intention is manifest, and the decree of Mr. *Fraser*, though untouched in terms, is in effect suspended by Mr. *Campbell's* judgment, upon a liberal construction of the language of the petition to appeal, this part of the judgment of Mr. *Campbell* may be considered as included within the term "varied." When the appellate Court in *India* on appeal has omitted to decide a question raised by the appeal, their Lordships have remitted the case for decision to that Tribunal, in all cases where they did not find clearly on the Record before them materials for a final judgment doing complete justice between the parties. This case is not of that nature. Mr. *Fraser* forbore to question the Appellant's title under the *Firman*, because that *Firman* could not be questioned in that Court. That Court itself existed under an exercise of powers of a similar character, and it did not think itself invested with a jurisdiction to question an act of State, under which the *Firman* had its origin. The Proclamation was necessarily impeached by impeaching the *Firman*, and it was

1867.



NAWAB  
UMJAD  
ALLY KHAN

v.

MUSSUMAT  
MOHUMDEE  
BEGUM.

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

undoubtedly an act of State. Even if this act could be directly or indirectly questioned in a Municipal Court (on which we express no opinion), the contention must be raised on a suit duly constituted to which the Government must be made a party. The forfeited estates were not assets at the time of the *Nawab's* death, and could only be treated as such when the Government title was displaced. To remand the case for hearing to the Judicial Commissioner would be simply to involve the parties in unnecessary expense, and subject them to unnecessary delay, since it must be accompanied with a declaration that in the suit, between those parties, and on those pleadings, the legality of the title of the Grantors of the *Firman* could not be questioned.

The objection raised to the *Solehnameh* by Mr. *Bell* (which it is necessary to notice only as respects the lands in *Furruckabad*) does not arise on the facts. The consideration, two rings, may be small and inadequate in the sense of purchase money; but it cannot be treated as of no pecuniary value; and the Record furnishes no grounds to justify a remand to the Judicial Commissioner on this comparatively trifling point.

Their Lordships think, that a vaild gift, *inter vivos*, as to the Company's paper, was effected by the *Nawab* in his lifetime in favour of his Son, the Appellant, and, therefore, they deem it unnecessary to consider the question as to the genuineness of the documents set forth as constituting his Will, or to consider, whether the non-assent of the heirs does or does not vitiate the Will of a Mahomedan of the *Sheah* school in favour of an heir.

On the whole case, they will humbly advise Her



Majesty to reverse the decision of the Judicial Commissioner of *Oude*, except as to the appointment of a co-trustee, and to affirm the decision of the Civil Judge, Mr. *Fraser*, with that variation.

As the contention in this appeal arises from the acts of the last owner, who has subjected his property, by his mode of dealing with it, to questions fairly raised, their Lordships think that the costs of the appeal of both parties should come out of the residuary estate.

1867.  
 NAWAB  
 UMJAD  
 ALLY KHAN  
 v.  
 MUSSUMAT  
 MOHUMDEE  
 BEGUM.

MOONSHEE BUZLOOR RUHEEM ... *Appellant*,

AND

SHUMSOONNISSA BEGUM ... *Respondent* ;

(Three appeals)

AND

JODONATH BOSE ... *Appellant*,

AND

SHUMSOONNISSA BEGUM ... *Respondent.\**

*On appeal from the High Court of Judicature at Calcutta.*

THESE appeals were brought from decrees of the High Court, and, as regarded the first three, were from decrees made in suits between the same parties,

° Present : Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

recover the value of Company's paper and real and personal estate, the plaint alleged, that such paper being her separate property, had been,

12th, 13th,  
 14th, 15th &  
 16th Feb.,  
 1867.

In a suit by  
 a Wife (a  
 Mahomedan  
 woman)  
 against her  
 Husband to

1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

and as regarded the fourth, which, related to property, the title to which involved the same rights of the Respondent, were all heard together. The first suit was brought by the Respondent, *Shumsoonissa Begum*, the wife of the Appellant, *Moonshee Buzloor Ruheem*, to recover possession of certain real and personal property stated by her to have been entrusted to the Appellant, the right and title to which she contended she had never parted with. The personal property sought to be recovered from the Appellant consisted of Government securities, known as Company's paper, to a very large amount, together with money, jewels, and other personalty, also of very considerable value. The real estate which she

as she lived in seclusion, indorsed and handed over by her to her Husband for the purpose of receiving the interest thereon. The defence of the Husband was, that he had purchased such paper from his Wife, and on the indorsement and delivery had paid the full value to his Wife, who had appropriated the proceeds to her own use. Held, upon a review of the evidence, that although the Wife failed to prove affirmatively the precise case alleged by her in the plaint, the Husband was bound to show something more than the mere indorsement and delivery of the Company's paper, and that from the relations subsisting between the parties, the *onus probandi* was upon him to establish; first, that the transaction which he set up was a *bona fide* sale; and second, that he gave full value for the Company's paper so received from his Wife.

Held, further, that in the absence of proof of the Husband having the means of purchasing the Company's paper, he being at the time in embarrassed circumstances, and the condition of the Wife, a secluded woman, that no purchase had taken place, and that the transaction was fraudulent as against her.

Although the habit of holding land *Benamee* in prevalent is *India*, such fact does not justify the Court in making every presumption of such holding against apparent ownership.

A suit for restitution of conjugal rights will lie in a Civil Court by a Mahomedan Husband to enforce his marital rights.

By the Mahomedan Law such a suit is in the nature of a suit for specific performance, being founded on a contract of marriage, the Mahomedan Law regarding it as a civil contract, and the Court will enforce all the obligations which flow from such a contract.

If, however, there be cruelty to a degree rendering it unsafe for the Wife to return to her Husband's dominion, the Court will refuse to send her back to his House; so also, if there be a gross failure by the Husband of the performance of obligations which the marriage contract imposes on him for the benefit of the Wife, it affords sufficient ground for refusing him relief in such a suit.

From the frame of the pleadings and issues, the question of cruelty



sought to recover from the Appellant in the suit comprised certain shares in two gardens, named *Dum-Dum* and *Narain Mundul*, which were in the possession of the Appellant, *Jodonath Bose*, and one *Mirtunjoy Bose*, a defendant in the Court below, but who had not appealed, having been, as the Respondent alleged, acquired by them by means of a fictitious sale, and not *bonâ fide*, and held by them *Benamee*, or in trust for the Appellant. The second suit, which constituted the third of these appeals, was instituted by the Appellant against the Respondent, who had withdrawn from his House and protection; and was in the nature of a suit for restitution of conjugal rights. The third suit was brought by the Respondent against the Appellant to recover a single Company's paper.

The general facts were as follows:—In the month of *Bysack*, 1254, B.E., corresponding with the months of *April* and *May*, 1847, C.E., the Appellant intermarried with the Respondent, then a Widow, according to the laws and usages of the Mahomedans, and by the form or ceremony called "*Nikah*," The Respondent was the Mother of five children (two Sons and

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

was not properly entered into, but in the circumstances of the conduct of the Husband towards his Wife, the Judicial Committee declined to direct the Wife to be sent back to her Husband, and remitted the cause back to the Court below for a new trial, with liberty to frame issues and take evidence as to the specific acts of cruelty.

Sec. 7 of Act, No. VIII. of 1859, provides, that if a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained. Held, on a construction of this section, first, that the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit; and secondly, that it included accidental error and involuntary omission of the subject of the new suit.

A suit cannot be maintained to recover a specific Company's Note when the cause of action in a former suit was the misappropriation by the same Defendant of similar Company's Notes, as such claim for the individual note might have been included in the former suit.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

three Daughters) by her first Husband, who had died about six months previous to her second marriage. Soon after the marriage, the Respondent, with her children, took up their residence at the House of the Appellant, at *Sealdah*, in the suburbs of *Calcutta*. At the time of her marriage with the Appellant, the Respondent was in possession of considerable property, both real and personal, which she had inherited from her Father, *Moonshee Hossain Ally*, who died in 1837, leaving the Respondent, his Daughter, her Mother, and two other Widows, and a Nephew, who were, by Mahomedan Law, his heirs. Litigation had taken place between the Respondent and some of the co-heirs, and part of her property was the result of such litigation, as well as other portions which had accrued to her by right of succession to her Father's deceased heirs and her own co-heirs. From the time of her marriage to the year 1855, the Appellant and Respondent lived and cohabited together as Husband and Wife, during which time she bore him a Daughter. Very serious dissensions, however, having arisen in that year between them, occasioned chiefly by the Appellant's dealings with her property, the alleged cause of his ill-treatment of her, the Respondent presented a petition to the Magistrate of the *Zillah* for protection, and obtained an Order from him, giving her the option to live where she chose, but declaring that she was not thereby separated from her position as the Wife of the Appellant; and, to prevent the commission of any acts that might lead to an affray, the Appellant was bound over, by recognizance in Rs. 10,000, for a year, liberty being given to the Respondent to sue for having been beaten and confined by the Appellant.



In consequence of these proceedings, the Respondent filed a plaint in the first suit on the 8th of *April*, 1856, in the Court of the Principal *Sudder Ameen* of *Zillah* Twenty-four *Pergunnahs*, against the Appellant, to recover the real and personal property belonging to her, including the Government paper, and alleged, that the same have been wrongfully taken possession of and dealt with by him. The plaint stated the particulars above mentioned, and gave a detailed account of the value of the property claimed, which amounted in the whole to the sum of Rs. 534,794.

The Appellant, by his answer, denied the statements in the plaint, regarding his having taken possession for his own use of the Respondent's property, especially the Government paper, but admitted having dealt with it as alleged, and stated some particulars regarding the disposition of portions of the real estate, which rendered it necessary for the Respondent to file a Supplemental plaint to make other Defendants to the suit, among whom were the Appellant, *Jodonath Bose*, and *Mirtunjoy Bose*, who were alleged to hold *Benamee* for the Appellant two gardens therein described, called *Dum-Dum* and *Narain Mundul* gardens; which these Defendants by their answer alleged, that they had become *baná fide* purchasers and were in possession of, on their own individual account, and not *Benamee*. The other Defendants by their answer disclaimed all interest in the matter the subject of the suit.

The hearing of the suit took place before Mr. *E. Latour*, the Judge of the *Zillah* Court of the Twenty-four *Pergunnahs*, on the 25th of *July*, 1859, when a decree was made in favour of the Respondent, the amount of her claim being reduced to R. 234,800, on

1867.

MOONSHÉE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,

AND

JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

account of Company's paper, and R. 20,511 for personalty, with judgment and possession for the real estate in the possession of the Appellant, *Jodonath Bose*, and *Mirtunjoy Bose*.

*Moonshee Buzloor Ruheem*, *Mirtunjoy Bose*, and *Jodonath Bose*, severally appealed from this decision to the High Court at *Calcutta*, and these appeals were heard together on the 29th of *November*, 1862, when the Court, consisting of Messrs. *Trevor*, *W. Seton-Karr*, and *L. S. Jackson*, affirmed, with some slight modifications, the decree of the *Zillah* Court, and dismissed the three appeals with costs. The Appellants, *Moonshee Buzloor Ruheem* and *Jodonath Bose*, separately appealed from this judgment to Her Majesty in Council, and these constituted two of the present appeals.

In the second suit, out of which the third appeal arose, the Appellant sought for a judicial determination of his right as a Mahomedan Husband under Mahomedan Law, to recover possession of his Wife's person, the marriage contract being still in force, no divorce having been decreed. The Respondent by her answer insisted that, having regard to the oppression and cruelty which had been practised upon her, it was contrary both to the Mahomedan Law and to justice to deliver her up to her Husband, and contended that, as he had become a Freemason, he had thereby become an outcast from the Mahomedan faith, and could no longer assert his marital rights. The other Defendant, *Zahoor Ahmed*, his wife's son-in-law, by his answer denied that the Respondent left the Appellant's House by his advice, but admitted petitioning the Magistrate for the Respondent's release from confinement in the Appellant's House.



The material issues recorded in bar to the suit were, whether, as the *Foujdary* Court had made an Order allowing the Respondent to remain anywhere, according to her inclination, the suit brought by the Appellant could be entertained ; whether the Appellant had committed any act not sanctioned by his religion, or had been guilty of any oppression on his Wife ; whether, having regard to the circumstances stated in the first issue, even if he were proved guilty of the cruelty alleged, he could obtain restitution of her against her consent ; and whether, if not proved guilty, he could obtain possession of her. Upon the question of law, the issues were, first, whether, according to the Mahomedan Law, a Husband, against the wish of his Wife, could bring her under his control or not ; second, whether by joining the Freemasons and becoming a Freemason the Appellant had, according to the Mahomedan Law, lost caste and become an outcast ; third, whether, a person made an outcast could have, according to the Mahomedan Law, control over his Wife ; and lastly, whether a Husband using oppression on his Wife loses the right as Husband over her.

Upon the points of law involved in this suit, the opinion of the Law Officer of the *Zillah* Court was to the effect that a Mahomedan by embracing Freemasonry became an outcast ; but that, if he remained a Mussulman, he was entitled to his Wife's person, notwithstanding he was guilty of tyranny and oppression. Another opinion, of a contrary tenor, with respect to the effect of becoming a Freemason, was filed by the Appellant, and the Principal *Sudder Ameen* ultimately decided in his favour on this point, that he had not thereby lost caste.

1867.  
 MOONSHEE  
 BUZLOOR  
 RUHEEM  
 v.  
 SHUMSOON-  
 NISSA BEGUM,  
 AND  
 JODONATH  
 BOSE  
 v.  
 SHUMSOON-  
 NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

Evidence was entered into for the Appellant. Two of the witnesses, who were his relatives, stated that they had access to the female apartments of the Respondent, and had not observed any acts of oppression practised on her. The Respondent put in evidence the petition to the Magistrate and the Order made thereon giving her leave to live apart from the Appellant, but there was no evidence given of any specific act of ill-treatment towards her, except such as was alleged regarding the deprivation of her property.

As to the merits of the case, the Principal *Sudder Ameen* (*Tarucknauth Sen*) found, that the oppression had been proved, and that the Respondent was in danger of her life. That danger he considered was not lessened by the fact, that she had instituted the before-mentioned suit against her Husband to recover property of which she alleged he had fraudulently deprived her during her marriage, and had obtained a decree against him for five *lacs* of Rupees, and, relying upon two *Futwas* filed by the Respondent, the Judge held, that neither by the Mahomedan Law nor by natural justice was the Appellant, under such circumstances, entitled to the aid of the Court to enable him to recover possession of his Wife's person.

An appeal from this decree was brought by the Appellant to the High Court at *Calcutta*, and heard by Messrs. *C. Steer* and *W. S. Seton-Karr*, two of the Judges of that Court, who pronounced the following judgment:—"It appears that the Defendant was left a young Widow, and with large means. The Plaintiff induced her to marry him, and they lived together for some years. In that time, however, the Plaintiff managed to make away with a



great part of his Wife's fortune, and he did so by fraudulent means on some occasions. Having, by these and other means, done great damage to the property of his Wife, he commenced then to illuse her. He behaved oppressively to her, and shut her up as if in a Prison. At length this state of things came to the acknowledge of the Magistrate, and he went and released her. Judging from what he saw, and from what was told to him, it did not appear to the Magistrate that it would be safe to allow the Defendant to live any longer under the absolute control of her Husband, and at her desire she was allowed to quit his roof, and to find another residence for herself. She, lately the rich Widow, left the Plaintiff's dwelling with the bare clothes on her back, and since then she has succeeded in an action against her Husband, in which a decree has been given against him for upwards of five *lacs*. These are all facts which have been judicially ascertained, and now the Plaintiff comes into Court to invoke the aid of the law, to compel his Wife to return to his House and to live with him. The Pleader for the Plaintiff in this Court argues, that this is a case which must be decided in conformity to the Mahomedan Law; that that law does not permit a Wife to separate from her Husband, except upon a divorce; that at present there has been no divorce, and the Wife should, therefore, be compelled to go back to her Husband; that cruelty is no ground for the Court to set aside the provisions of the Mahomedan Law, for in ordering the Wife back, the Court can impose such conditions upon the Plaintiff as will ensure his Wife good treatment for the future. Referring to the *Hedāya* under the head of 'Divorce,' we see that the Mahomedan Law does not per-

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

mit a Wife to divorce herself, but the Husband can divorce his Wife whenever he pleases. This has also been ruled in a decision of the late *Sudder* Court, *vide* Vol. V. of the Select Reports, p. 200, the decision being dated the 5th of *May*, 1832. There is, however, a ceremony called '*Kolah*' by which a Wife may possibly obtain a separation from her Husband, but this requires also the consent of the Husband, and it does not appear that the Wife can by any possibility separate herself, except by the consent of her Husband. This being so, are we required to decide this case in conformity to the principles of the Mahomedan Law? Are we to compel the Defendant to return to her Husband, convinced as we are that she should not be forced to return? If under the Mahomedan Law no Wife can separate herself from her Husband under any circumstances whatsoever, the law is clearly repugnant to natural justice, and we are not bound to follow it. The Mahomedan Law giving no relief to a Wife, be the conduct of the Husband ever so bad, it is a case to be disposed of by equity, and good conscience. And on these principles, we have no hesitation in saying, that the grounds upon which the Defendant has separated from her Husband justify her in that step, and that we should be making the Court the engine of a grievous injustice, if we gave the Plaintiff free power and control over the person of the Defendant, by ordering her to return to him. As to the suggestion of the Plaintiff's *Vakeel* that we might impose such conditions upon his Client as would ensure his Wife proper treatment at his hands, it is out of the question. It would not be just to the Defendant to adopt such a course, she being herself unwilling to return on any terms, and her



grounds for separation being so well founded, nor would it be possible, living as Mahomedans of rank do with their Wives, to adopt any measures of prevention which would hold out any hope of being efficacious. On these grounds we uphold the judgment of the Lower Court, and dismiss the appeal with costs." From this decision the third appeal was brought.

The third suit was also instituted in the *Zillah* Court of the Twenty-four *Pergunnahs* on the 31st of *December*, 1861, by the Respondent against the Appellant. The principal questions raised were, first, whether, under sec. 7, Act, No. VIII. of 1859, the claim made by the suit could be entertained and adjudicated upon by the Court, inasmuch as the subject matter had been omitted from the first suit, and might have formed a part, being, as before stated, brought by the same Plaintiff against the same Defendant; and, secondly, whether the suit was not barred by effluxion of time, under the twelve years' rule of limitation. The object of the suit was to recover the possession of a single Government security (Company's paper) distinguished as No. 16,142 of 1832-3, for the principal sum of Rs. 10,000, with interest alleged to be due thereon, amounting to Rs. 21,155. 9a. 5p. The plaint stated, that the Company's paper in question formed a part of the estate of the Plaintiff's Father, and had been delivered to her on the 16th of *September*, 1847; but that, as the same was standing in his name, she was unable to obtain payment of the interest in respect of the same from the Government Treasury; that in consequence she presented a petition to the *Zillah* Judge to obtain a Certificate of administration, under Act, No. XX. of 1841, and that such petition was, by the Order of the Judge, dated the

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON.  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON.  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

5th of *May*, 1848, rejected. The plaint then stated, that she was induced, by the Defendant's representation that he would draw the interest, to indorse the Government paper in his name, and that the Defendant, through the indorsement, represented that he had purchased the paper, filed an appeal before the *Sudder*, in dissatisfaction with the aforesaid Order of the Judge; and, as he held in his hands her seal, he caused a petition to be filed on her part to the effect that the paper had been purchased by him; and upon this, on the 11th of *September*, 1848, an Order was passed. The plaint then stated the circumstances relating to her withdrawal from her Husband's house, as already detailed, and admitted that she had instituted a previous suit to recover her real and personal property, distinguished as suit, No. 30 of 1856, against the Defendant, and that she had obtained in such suit a decree in her favour. She excused herself from having omitted in that suit the Company's paper now sued for, and for not then suing for it, by stating, that as she was a *Purdahnusheen* (a veiled or secluded woman), and unacquainted with reading and writing, she could not ascertain anything about the Government paper for Rs. 10,000, and the interest of the same, and consequently that was not included in her former claim. That she obtained knowledge of the Government paper in the month of *July*, 1859, and that the cause of action arose from that time; and she accordingly instituted the suit to obtain the Government paper, or the sum of Rs. 21,155. 9a. 5p., according to an annexed account.

The Appellant, by his answer, insisted that the Respondent had in fact sold to him the Company's paper in question on the 16th of *July*, 1848, for C.



Rs. 13,315. 8a. 15p., and that he had, on the 30th of *October* following, sold and transferred the same to a third party he named, for Rs. 13,777. 12a. 5p. The answer then pleaded three several pleas in bar to the Plaintiff's suit. First, that the suit was barred by *Ben. Reg. III. of 1793, sec. 14*, as twelve years had elapsed from the dates of his purchase and sale aforesaid. Secondly, that on the 30th of *November, 1856*, the Respondent had instituted a suit against him to recover Rs. 534,794, on the same cause of action as the present suit, and had obtained a decree therein on the 25th of *July, 1859*, and submitted to the Court, that the suit ought to be dismissed on that ground, under Act, No. VIII. of 1859, sec. 2 (the Code of Civil Procedure), as well as under *Ben. Reg. III. of 1793, sec. 16*, as she had sued again on the same cause of action ; and thirdly, that the suit ought to be dismissed also under sec. 7 of the Act, No. VIII. of 1859, and that the rule therein enacted had been always in force, that all claims coming under one and the same cause of action are to be brought in one suit, and that this rule was enjoined by the Circular Order, dated the 30th of *September, 1847*.

Issues in the suit were recorded by the Principal *Sudder Ameen*. Those on the part of the Plaintiff being, first, whether the Defendant, being a Trustee for the Plaintiff, could be held liable to the Plaintiff in this suit ? And on the part of the Defendant in bar of suit, first, whether the action, having been divided, could be maintained ? Secondly, whether the action was barred by the operation of limitation ? On the merits, whether the Government paper was fairly purchased by the payment of consideration ?

The hearing of the suit took place before Mr. *L.*

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,

AND

JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

*Latour*, the Judge of the *Zillah* of Twenty-four *Pergunnahs*, on the 20th of *March*, 1862, when he delivered the following judgment:—"By her own account, the Plaintiff knew all about the Company's paper in *May*, 1848, indeed, it was made over to her in 1847; failing in obtaining a Certificate, she indorsed it over to her Husband for the express purpose of drawing the interest; the present suit is preferred on the last day of limitation, under the old law, 31st of *December*, 1861. It is clear, therefore, that this suit is barred by limitation of time; to let in the larger limitation, fraud must be specially pleaded, and there is one point only in which, if pleaded specially, this Court might hold that limitation would not apply, viz., that the Defendant was a Trustee for his Wife; but the Court will not enter into this matter at length, because the action must fail under sec. 7 of Act, No. VIII. of 1859. By that section, if a Plaintiff relinquish or omit to sue for any portion of his claim, a suit will not eventually lie to recover such portion. It is argued, that, 'omission' means 'intentional omission,' that the Plaintiff did not know of this rule, and therefore, did not intentionally omit to sue for it; but omission is a negligent omission in contradiction to a voluntary surrender of a portion of a claim, and laches, is loss. It is quite clear, that the facts connected with this Note were openly known through the different proceedings. The Defendant claimed the Note, as indorsee for value, on the petition of the 30th of *Srabun*, 1255, on the execution against his Wife, the Plaintiff; he also sued to set aside the summary Order rejecting his claim, which action was dismissed in *Feyt*, 1257 B.S., so that there has been an extraordinary quantity of sunlight about this particular



paper at variance with any idea of fraudulent concealment. The case of *Casseenath v. Pemberton* (21st September, 1843) is referred to, where a claim to a portion of estate was recognized which had not been included in the original action. In that case the Defendant had fraudulently concealed that portion of the estate; and, therefore, there is no analogy common to the present suit. I think that ignorance cannot be pleaded on the face of available knowledge, and that the Plaintiff was bound to include the present claim in her previous action. Secondly, that no case is made out for extraordinary limitations," and he accordingly gave judgment for the Defendant upon both pleas in bar.

The Respondent appealed to the High Court at *Calcutta*, objecting to the ruling of the Judge as to sec. 7 of Act, No. VIII. of 1859 operating as a bar to the suit, submitting, that the subject of her claim was not included in the former suit, owing to her ignorance, and not from design.

The hearing of the appeal took place on the 13th of *February*, 1863, before Messrs. *Bayley* and *Seton-Karr*, two of the Judges of that Court, who gave judgment as follows:—"The Plaintiff, it is clear, had a knowledge of the existence of this paper before she brought her first suit, and might have included it in that suit; and the real question for us to decide is, whether this omission, neglect, or oversight, is sufficient to bar her present claim under the law, fairly applied." And, after referring to the provisions of sec. 7 of Act, No. VIII. of 1859, the judgment proceeded,—“The Plaintiff could not have been actuated by any fraudulent or dishonest motive in omitting this portion of her claim. In this view, we are of opinion, that though it might

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,

AND

JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

be desirable for the ends of justice, and for the sake of perspicuity, that the various items claimed by the Plaintiff should form the subject of one single action, and though, in fact, they were mainly included by her in one action, yet there is nothing in the law, as we read it, to make it absolutely imperative on her to include every item of such a claim as hers in one single suit. Nor do we think that, under the circumstances of the case, the Plaintiff may not fairly plead that she has a distinct and separate cause of action for the recovery of this piece of paper made over to the Defendant on a particular date. When we consider, further, that the action rests on the alleged fraudulent misappropriation by the Defendant of property given to him in trust, we think it extremely desirable that the case should go to trial on the merits, if the law allows this, as we hold it does. As regards limitation, in point of time, which we infer from his remarks, that the Judge holds to apply to this case, we think it only necessary to observe, that limitation would not run against a Wife in the case of a Husband, who is a Trustee of valuable property for her benefit, he holding strictly as Trustee for her use, and would be bound to account for the property to whatever shape or uses he himself had put it. Holding, therefore, these views, after a careful consideration of the legal points urged, we set aside the Judge's decree of dismissal, and remand the case for a full trial on its merits."

The Appellant brought the present appeal (the fourth) from the decree founded on this judgment.

The Attorney General (Sir John Rolt, Q. C.)  
and Mr. Leith, for the first Appellant.



These appeals being between the same parties, and substantially affecting the same rights, are now by consent argued together. *Shumsoonnissa Begum*, the Wife of the Appellant, *Moonshee Buzloor Ruheem*, is the Respondent in the four appeals, and was the original Plaintiff in two of the suits, and the Defendant in the other. The suits which constitute the two first and fourth appeals relate to the real and personal estate of the Respondent, and may be termed the "Property suits." The other appeal is known as the "Restitution suit." In the Court below, separate evidence was adduced in each suit; it will be convenient, therefore, to keep the cases distinct in argument. Now, the first suit, which is described as suit, No. 30 of 1856, was brought by the Respondent as Plaintiff against the Appellant as sole Defendant, and sought, after a cohabitation as Husband and Wife of upwards of eight years, to recover personal property, consisting of Company's paper, endorsed and delivered over by her to him at various times subsequent to her marriage, to a large amount, besides jewels, money, and other personalty, alleged to be of the value of upwards of Rs. 534,794, and real estate consisting of shares in certain gardens. It is true, that this sum was much reduced by the decrees of the *Zillah* and High Courts, but it was proved and admitted, that the Respondent had herself made over the property in question to her Husband, and after such proof the *onus* lay on the Respondent to prove the claim set up by her, and not, as the Courts below have held, on the Appellant to disprove the claim so made on him, as she alleged and proceeded on the ground of fraud, deceit, and undue influence. The *onus probandi* was on her, as she charged fraud,

1867.

MOONSHEE  
BUZLOOR  
RUHEEMv.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSEv.  
SHUMSOON-  
NISSA BEGUM.



1867.

MOONSHER  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

coercion, and deceit to establish such charges, which the evidence clearly disproves. Respecting the Government securities, known as Company's paper, the evidence shows, that these securities were made over by the Respondent to her Husband, being indorsed by her, and delivered over to him for a good consideration, and the proceeds applied by him for her family. This transaction is in entire consistency with the law and custom prevailing among Mahomedans in *India*. Under the Mahomedan law, Husband and Wife, in relation to any property possessed by them respectively, or any money obligations they may be severally under, are treated and considered as altogether distinct persons in law, and, as such, respectively capable of selling and purchasing, or making or receiving gifts to or from each other, and even of contracting debts with each other. The Respondent is proved by the evidence to have had a sufficient capacity for business, and to have been always keenly alive to her own rights and interests whenever they were in any way imperilled. Nothing, therefore, but clear evidence of fraud, deceit, or coercion, which was entirely wanting, could have justified the Courts below in setting aside and declaring null the legal transfers by the Respondent of her property. There was no such evidence; on the contrary, her own admissions on the record, as to the fact of the sales effected by her in favour of the Appellant, operated as an estoppel to the claim made by her, and ought to have been so treated by the Courts below. As regards the claim for jewels and other personal estate, the claim to such property was reduced in the first instance by the *Zillah* Court to Rs. 20,511, but the High Court disallowed the claim altogether, and we submit that there is



no evidence that could warrant any other judgment. The claim regarding the real estate arose upon the supplemental suit, and the Appellant, *Jodonath Bose*, through deriving his title through *Moonshee Buzloor Ruheem*, appeared separately in the Courts below, and is here represented by other Counsel; it is not requisite for us, therefore, to go into his case, though the evidence of fraud or connivance is in all respects similar, the transactions regarding the dealing with the personal and real estate being mixed and simultaneous, and there is an equal deficiency of proof in respect of the real estate, as we have already shown, regarding the dealings with the personal estate.

The other suit, out of which the second appeal arises, is the "Restitution suit." Now, we contend, that the Courts below have entirely miscarried in their judgments in this suit, and that the decree refusing to order the Respondent to return to her Husband's home was not warranted either by Mahomedan law, or the facts of the case. The parties are Mahomedans, and by *Ben. Reg. IV. of 1793, sec. 15*, their rights ought to have been determined according to the Mahomedan law. However obnoxious to English notions, the law regulating caste, custom, and inheritance in *India* must be observed, as held in the *Suttee* case (a). Even now slavery is recognized in *India*. By the Mahomedan law, a Wife cannot separate herself from her Husband, and divorce must proceed from the Husband. *Hedaya*, Vol. I. Book IV. ch. 1, p. 201. And this, as observed by the Judges of the High Court, has been followed by the *Sudder Dewanny* Court

1867.  
 MOONSHEE  
 BUZLOOR  
 RUHEEM  
 v.  
 SHUMSOON-  
 NISSA BEGUM,  
 AND  
 JODONATH  
 BOSE  
 v.  
 SHUMSOON-  
 NISSA BEGUM.

(a) Heard before the Privy Council, 23rd June, 1832.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

in the case of *Maulvi Abdul Wahab v. Mussumat Ilingu* (a). That case shows that a suit for restitution of conjugal rights will lie in the Civil Court; *Mussumaut Ameena v. Kuttoo Khan* (b), *Mussumat Dooeen Beebee v. Sheik Mennoo* (c); although he has no right to force his Wife to come to his house, *Macnaghten* "On Moohummadan Law," p. 282. The law was rightly stated by the Judges of the High Court, but the conclusion to which they came to, that, notwithstanding the Mahomedan law, "it was repugnant to natural justice" to administer it, and that the case was to be disposed of by them according to what they termed "equity and good conscience," was not only inconsistent with the law governing the case, but was an erroneous application of the rule of decision directed by *Ben. Regs.*, IV. of 1793, sec. 15; III. of 1733, sec. 21, VI. of 1793, sec. 31, and VII. of 1832, sec. 9, to be observed by the Courts. The Court ought to have decided the case according to the Mahomedan law, and not have exercised a fanciful discretion in refusing a just right by that law. In the case of *The Queen v. Shapurji Bessonji* (d), the Supreme Court issued a *Habeas Corpus* to deliver the custody of a Child to its Father, although the Father had changed his religion. The *Parsee* case, *Ardaseer Cursetjee v. Perozeboye* (e), though it may be relied on by the Respondent, is no authority against the Court's jurisdiction to compel the Respondent to return to her Husband's home; all that was decided in that case was, that the remedy was not to be obtained on the

(a) 5 Ben. Sud. Dew. Ad. Rep., p. 200.

(b) 7 Ben. Sud. Dew. Ad. Rep., p. 27.

(c) Sel. Rep., 103.

(d) Perry's Oriental Cases, 91.

(e) 6 Moore's Ind. App. Cases, 348.



Ecclesiastical side of the Court, contrary to the ruling in the case of *Buchaboye v. Merwangee Nassarwangee*(a). Here the proceedings are in a civil Court. The *Futwas* of the law Officers of the Court were conclusive, and ought to have guided the Judges. If they were dissatisfied with the opinions so taken in the *Zillah* Court, it was the duty of the Judges of the High Court to obtain a further exposition of the law from the Mahomedan law Officers of that Court. Then as to the alleged cruelty by the Appellant, supposing even that, according to the law applicable to the case, namely, the Mahomedan law, ill-treatment or alleged cruelty could form a ground for such a judgment as is appealed from. There was no cruelty on the part of the Appellant; he could by the Mahomedan law, *Baillie's* "Dig. of Moohummudan Law," p. 13, as well as by the English law, prevent his Wife leaving her home if she wanted to go away, *Rex v. Cockrane* (b). There was really no evidence of the acts of cruelty alleged, or of any such cruelty as could have justified the decision of the Courts below; the Judges referred only to the *Roobekary* of the Magistrate, which was made *ex parte*, and they assumed, without any warrant, that his conclusion was well founded. But even if all that was alleged had been proved, the *Futwas* of the law Officers, as well as the authorities on the Mahomedan law already referred to, show that the proper course for the Judges to have taken would have been to decree a restitution of conjugal rights, with, if necessary, an inhibition against the Appellant from acting in a tyrannical or oppressive manner to his Wife, or to have taken other precautionary measures, as were within their power and authority, to

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

(a) Perry's Oriental Cases, 73.

(b) 8 Dowling's P. C., 63.



1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

prevent the occurrence or repetition of the acts complained of.

The third appeal by this Appellant relates to the suit for recovery of the Company's paper for Rs. 10,000 and interest. It is confidently submitted, that the High Court were wrong in their decision. First, as the suit of the Respondent was barred under section 7 of Act, No. VIII. of 1859, inasmuch as her claim in the latter suit ought to have been included in the former suit brought by her against the Appellant. By that section of the Act, the Court below was absolutely prohibited from entertaining any suit for such portion of a Plaintiff's claim as she may have omitted to sue for in a previous suit, the decree of the Court below properly found that the Respondent had a knowledge of the existence of the Company's paper in question before she brought her first suit, and she might have included her claim in respect of it in that suit, but the decree, we submit, erroneously refused to give effect to the statutory prohibition, on the ground that the Respondent could not have been actuated by any dishonest or fraudulent motive in omitting this portion of her claim, although there is no such exception to be found in the above Act, and, secondly, the suit was barred by the period of limitation having expired by effluxion of time, from the date of the cause of action, *Ben. Reg.* III. of 1793, sec. 14. Even on the merits the decree cannot be supported, as there is no sufficient evidence to support the facts pleaded.

Mr. *Pontifex*, for the Appellant, *Jodonath Bose*.

The Appellant, for whom I appear, was first made



a party to the suit by supplemental plaint. He was in possession of a very small portion only of the real estate formerly belonging to the Respondent, but part of which was sold by her, first to her Husband, the other Appellant, and purchased from him by the Appellant and one *Mirtunjoy Bose*, who is not an Appellant here, and the other part purchased direct from the Respondent herself. The allegation of the Respondent, that the property so purchased was held *Benamee*, or in trust by this Appellant for her Husband, is entirely without support or foundation. The purchases, both from the Respondent herself, as well as from the Appellant, *Moonshee Buzloor Ruheem*, were *bonâ fide*. There is no evidence of fraud on the part of this Appellant, nor is it even alleged, that the purchases made by him were made at an undervalue or by collusion. The *onus* of proving such lay upon the Respondent, and no such proof has been given.

Sir *R. Palmer*, Q. C., and Mr. *Cave*, for the Respondent.

Though the facts, in these appeals, are numerous, the points at issue and for determination, are neither difficult nor complicated. We propose to take all the cases together, and first, as to the property suit. The same principles that would be applied in our Courts here, in circumstances such as this suit present, are applied to the Courts in *India*. The law in both countries is founded on the inalienable rights of moral justice. These principles are well defined and illustrated in the cases of *Cooke v. Lamotte* (a), and *Smith v. Kay* (b); and as regards

(a) 15 Beav., 234.

(b) 7 H. L. Cases, 750.

1867.  
 MOONSHEE  
 BUZLOOR  
 RUHEEM  
 v.  
 SHUMSOON-  
 NISSA BEGUM,  
 AND  
 JODONATH  
 BOSE  
 v.  
 SHUMSOON-  
 NISSA BEGUM.

1867.  
 MOONSHEE  
 BUZLOOR  
 RUHEEM  
 v.  
 SHUMSOON-  
 NISSA BEGUM,  
 AND  
 JODONATH  
 BOSE  
 v.  
 SHUMSOON-  
 NISSA BEGUM.

transactions between Husband and Wife in *Rich v. Cockell* (a), and *Darkin v. Darkin* (b), *Childers v. Childers* (c), *Curtis v. Perry* (d). The same rules are applied by the Courts in *India*, *Strange's "Hindu Law,"* Vol. I., 26-30 [Ed., 1827]. These authorities establish that, though a gift by a *Feme covert* of her separate estate to her Husband is not to be impeached without clear evidence of fraud, coercion, or deception; yet a gift to him is not to be inferred, and if there be evidence of fraud or deception on his part, then the transaction is either void altogether or enures as a trust for the Wife. That is exactly our case here; we admit the several indorsements of the notes and transfers of them by the Respondent to her Husband, but it was only for the purpose of obtaining the interest on them for her. Any sale by him of the notes to the purchasers, we insist was for her benefit, and such transfers were *Benamee*, creating a trust for the Respondent, and that the sale and conveyance of the real estate was fraudulent and void, if not a *Benamee* transaction. All the evidence goes to prove the allegations made by the Respondent in her pleadings, that the transfer made by her of her property to her Husband was for purposes of his management, and not for his personal benefit; and that would make all the transactions *Benamee*. Now, this is a case of a Mahomedan woman living in seclusion, and it is an acknowledged principle of law in *India* that the Courts will protect Native women so situate against their own acts, as they can scarcely be considered *sui generis*, *Latchem Umma v.*

(a) 9 Ves., 369-375.

(b) 17 Beav., 581.

(c) 1 De. G. & J., 482.

(d) 6 Ves., 739.



*Lewcock* and others (a); *Chellummal v. Garrow* (b); *Narsummal v. Latchmana Naie* (c). In such circumstances the *onus* of proving the *bonâ fides* of the alleged sales, and the payment of the consideration, was rightly laid by the Indian Courts upon the Appellant, *Smith v. Kay* (d). The *Zillah* Court was of opinion, that the Appellant had failed to prove such *bonâ fides* or payment, and the Judges of the High Court were of the same opinion, though they modified the decree of the *Zillah* Court. The finding of both Courts on the facts was substantially the same, and this Court will not disturb the finding of the Court below upon a mere question of fact. *Musadee Mahomed Cazum Sherazee v. Meerza Ally Mahomed Khan* (e). The Appellant's defence is, that the Respondent indorsed the several securities to him, first, because she could not obtain the interest due on them; second, because she could not manage her affairs herself; third, because she was afraid of her servants embezzling; and fourth, because she found herself in debt. The first and second reason assigned by the Appellant was discredited by the Courts below; the third and fourth were never suggested till the institution of the suit, and entirely failed in proof.

Second, with respect to the suit for restitution of conjugal rights. We do not now insist upon the objection taken in the Court below, that the Appellant, by becoming a Freemason, thereby lost caste, or any right to possession of his Wife's person, which he might have possessed under the Mahomedan law; but we submit, that the fact of cruelty and oppres-

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

(a) 1 Str. Mad. Rep., 30.

(b) 2 Str. Mad. Rep., 159.

(c) 7 H. L. Cases, 750.

(d) 2 Str. Mad. Rep., 14.

(e) 8 Moore's P. C. Cases, 91.



1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

sion of the Wife and such danger to her life as to induce her to leave her home having been proved, the Appellant was not entitled under the Mahomedan law to the aid of a civil Court to enable him to recover possession of her person. The law relied upon by the Appellant is not in force in *India*. *Ben. Reg. IV. of 1793, sec. 15*, preserves to the Natives their rights, usages, and customs, and is recognized by *Ben. Reg. VIII. of 1795, sec. 3*, as amended by *Reg. VII. of 1832, sec. 8*, which is the same as *Reg. IV. of 1793, sec. 15*; but that section of the last Regulation must be construed by the light of the case in *Peere Williams (a)*, where it is laid down, that a conquered country is governed by such laws as the Conqueror may impose; but until the Conqueror gives new laws the country is to be governed by its own laws, unless such laws are contrary to the laws of God. The Legislature of *India* cannot have intended to give to the customs prevailing in *India* greater force than the customs which prevailed in *England*. If it be said, that the Indian laws, customs, and usages have been guaranteed to the Natives by law, so have been those of *England* by Statutes, 9th *Hen. III., c. 9*; 1 *Edw. III., Stat. 2, c. 9*; 14th *Edw. III., Stat. 1, c. 1*; 2 *Hen. IV., c. 1, sec. 2*, but not observed. In cases in which no specific rule exists, the Courts are to decide the case according to justice, equity, and good conscience. It is so enacted by *Ben. Reg. VI. of 1793, sec. 31*. The Court, therefore, was right in refusing to send the Respondent home to her Husband. In *England* if a Wife swears the peace against her Hus-

(a) 2 P. Will., 75. See also upon this point, *Blankard v. Galdy*, Salk., 411; *Campbell v. Hall*, Cowp., 204; S. C. Loft., 655; *Spragge v. Stone*, referred to in *Brady v. Cubitt*, Doug., 35.



band the Court will not deliver her to her Husband, *Rex v. Brooke* (a). By the Mahomedan law it is not imperative for a Wife to reside with her Husband until her dower is paid, *Mussumet Dosun Bebee v. Sheik Munoo* (b), *Morley's Dig.* tit. "Husband and Wife," 42; or for brutal treatment on his part. *Précis de Jurisprudence Musulman, par Khalib Ibn Ishak, traduit de l'arabe par M. Perron*, vol. ii. p. 511.

By Reg. II. of 1798, sec. 4, it was intended, that that Law Officers of the several Courts should expound the law, and that the Judges should be guided by their exposition in ordinary cases, but not in particular cases wherein they might have reason to doubt the accuracy of such exposition. In such cases a further exposition of the law, from the Law Officers of the Superior Courts was not intended to be excluded.

Then with respect to the third suit, we contend, first, that the omission to include this particular Company's paper in the first suit was a simple oversight, and so the Court below held, and as the omission did not arise from any fraudulent or dishonest motive, nor from a desire to bring the suit within the jurisdiction of any Court, the provision of sec. 7 of Act, No. VIII. of 1859, did not apply. *Casheenath Mookerjee v. Prawnkishen Mookerjee* (c). It is distinguishable from *Radha Benode Misr v. Sheikh Musheetoolah* (d) and *Rae Hurree Kishen v. Rajah Putnee Mul* (e), the proof being necessarily the same in both cases, and the omission wilful. Secondly, with regard to the objection on the ground of the law of limitation, the Court below rightly determined that limitation would not run against a Wife in the case of a Husband

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

(a) 2 Burr., 1991.

(b) 9th May, 1832. Sel. Rep., 103.

(c) 7 Ben. Sud. Dew. Ad. Rep., 131. (d) *Ib.*, 350. (e) *Ib.*, 287.



1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

who was a Trustee for his Wife, therefore, the claim was not barred by the law of limitation. *Ben. Reg.* II. of 1805, sec. 3, ch. 4, excepts cases of mortgage and deposit, and requires possession under a title *bonâ fide* believed to have given a right of property, *Kutbi Begum v. Kalab Ali* (a). The limitation runs only from the discovery of the fraud. *Moohummud Reazodeen v. Akbur Ali Khan* (b). Act, No. XIV. of 1859, sec. I., cl. 15, gives a saving limitation of thirty and sixty years in suits against Depositories; and sec. II. enacts, that no suit against a Trustee is to be barred by any length of time. Section IX. is in point, for it provides, that if a right of action is concealed by fraud, the time runs only from the discovery of the fraud.

The Attorney-General, in reply :—

First, as to the Respondent's suit for recovery of the Company's paper and other personal and real estate. The *onus* was certainly not on the Appellant; on the contrary, it lay on the Respondent as Plaintiff to establish by evidence her allegation in the pleadings, which impeached the sales for fraud and want of good consideration. Undue influence is not to be presumed in a sale for value. Now, with regard to the alleged undue influence exercised by the Appellant over the Respondent, a great deal of confusion has arisen from the authorities cited by the Respondent on the Hindoo Law, which do not apply, and by confounding the position of a Hindoo Wife with a Mahomedan Wife. In the former case the Wife is under the tutelage of her Husband, and it is admitted that any act done by her is to be

(a) 5 Ben. Sud. Dew. Ad. Rep., 123.

(b) 1 Ben. Sud. Dew. Ad. Rep., 238.



jealously watched, but the Court will not strain the law to accommodate a particular case, however hard it may be; thus in *Exp. Balaram* (a) the Supreme Court at *Bombay* ordered a married Hindoo woman, who had left her Husband because he became a Christian, to return to his house. A Mahomedan *feme covert* may sue, or be sued, alone, *Bibee Ameerun v. Shaik Dawood* (b); and, in some respects, she is even more independent than an English woman, for there is by Mahomedan Law on marriage no community of goods. Therefore, although, at first sight, the relation of Husband and Wife, with respect to his influence over her in such a transaction as the present, may apparently be against the Appellant, yet as a Mahomedan Wife having separate property has absolute disposition over it, in a case like the present, it should be dealt with like a sale by her to a stranger for value. In the plaint there is no allegation of undue influence being exercised by the Appellant to induce her to part with the Company's paper; all she pleads is, that she handed them over to the Appellant for the purpose of receiving the interest. Our evidence establishes the *bond fide* sale, but the Court below, in the absence of any proof on the Respondent's part, dealt only with probabilities and presumed fraud. The English authorities relied on by the Respondent do not apply; but the case of *Hunter v. Atkins* (c) is in point. "There," Lord *Brougham* says, "the circumstances of the case do not warrant the Court in ascribing undue influence, influence improperly exerted over a person either of insufficient understanding, or under the control or management of another—the dupe of his artifices, or

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

(a) Perry's Oriental Cases, 516.

(b) 1 Fulton, 143.

(c) 3 Myl. &amp; K., 157.



1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

the victim of his contrivances, or subjected to his sway." Such undue influence must be established by positive proof.

Secondly, *Ben. Reg. IV. of 1793, sec. 15*, declares, that the rights of Mahomedans are to be regulated by Mahomedan Law, and it operates as a denial of justice if the Court hesitates to give the Appellant such relief as that law gives him. The case of *Maulvi Abdul Wahab v. Mussumat Hingu (a)* is an authority, that a Mahomedan Husband can recover the person of his Wife by civil action, and establishes our contention, that the Court will exercise the power to order the Wife to return to her Husband's house. The *Parsee* case, *Ardaseer Cursetjee v. Perozeboye (b)*, does not militate against this proposition, as it only establishes that the remedy of a *Parsee* woman for restitution of conjugal rights was not on the Ecclesiastical side of the Supreme Court. The penalty in this country, if an Ecclesiastical Court directs a Wife to return to cohabitation with her Husband, and she refuses, is to treat it as a contempt of Court, and she can be imprisoned for such contempt.

Third, the second suit by the Respondent against the Appellant being for recovery of a single Company's paper, alleged to have been fraudulently obtained from her by the Appellant, was known to her from the first, and ought to have been included in the first suit, and comes clearly within the provisions of sec. 7, No. VIII. of 1859, which expressly disallows such a suit, and it ought to have been dismissed by the Court below as a vexatious suit, the transactions out of which it arose being identical and already disposed of. More-

(a) 5 Ben. Sud. Dew. Ad. Rep., 200.

(b) 6 Moore's Ind. App. Cases, 348.



over, the suit was barred by the *Ben. Reg. of Limitation Reg. III. of 1793, sec. 14*, the period of limitation being calculated from the date when the cause of action arose.

Their Lordships' judgment in these appeals having been postponed, was now delivered by

The Right Hon. Sir JAMES W. COLVILE.

The Appellant, in three of the four appeals of which their lordships have now to dispose, is *Moonshee Buzloor Ruheem*, a Bengal *Zemindar*. The Respondent, in all four appeals, is his Wife, *Shumsoonnissa Begum*. Her Father, *Moonshee Hossain Ali*, died in the year 1837, possessed of considerable wealth. His co-heirs, according to Mahomedan law, were his three Widows, *Ashruffnissa Oomdatunnissa*, and the Respondent's Mother, *Komerunnissa*; two Daughters, viz., the Respondent and a posthumous child, named *Nujmunnissa*, and his Nephew, *Booali*. His estate was divisible amongst these persons, in twenty-four parts or shares, of which the Respondent and her Sister each took eight. The settlement of his affairs, however, occasioned a good deal of litigation, and the Respondent did not obtain full possession of her share until *November, 1847*.

She had previously, and in the month of *April* or *May* of that year, being then a Widow, with five children by her first Husband, become the Wife of the Appellant, *Moonshee Buzloor Ruheem*. By him she has had one Daughter. In *July, 1853*, in consequence of the death of her Sister, *Nujmunnissa*, which took place in *August, 1849*, and of the compromise of a suit with that Lady's Husband, she received a large accession of fortune. Her cohabitation with the *Moonshee*

1867.  
MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

4th July,  
1867.



1867.  
 MOONSHEE  
 BUZLOOR  
 RUHEEM  
 v.  
 SHUMSOON-  
 NISSA BEGUM,  
 AND  
 JODONATH  
 BOSE  
 v.  
 SHUMSOON-  
 NISSA BEGUM.

continued until the 28th of *December*, 1855; when, on a complaint by her of ill-usage on his part, she was allowed by the Magistrate of the Twenty-four *Per-gunnahs* to leave his house. They have since lived separately, and the present litigation dates from that time.

On the 8th of *April*, 1856, she instituted against her Husband a suit for the recovery of her property, which, she alleged, he had detained or made away with. On the same day he commenced against her and one of her sons-in-law a suit, of which the object was, to enforce his marital rights, by compelling her to return to his house and control. These suits, in the argument before us, were called, respectively, the "Property suit" and the "Restitution suit"—a nomenclature which it may be convenient to adopt.

The property suit was originally brought against the Husband alone. By his answer it appeared that certain portions of the landed property claimed by her had got into the possession of two persons, named *Jodonath Bose* and *Mirtunjoy Bose*. They were accordingly brought before the Court by supplemental plaint, on an allegation that they were the dependants of the principal Defendant the *Moonshee*, and held *Benamee* for him. The suit was tried before the Civil Judge of the Twenty-four *Pergunnahs*. His decree, which bore date the 25th of *July*, 1859, awarded to the Respondent Company's paper, to the amount of Rs. 2,34,800, and cash to the amount of Rs. 20,511, dismissing the suit as to the other movable property claimed by her. It also decreed the restitution to her of the immovable property held by *Jodonath Bose*, with mesne profits, to be paid by the *Moonshee*, but dismissed the suit as against *Mir-*



*tunjoy Bose* without costs. All the Defendants appealed against this decree, the appeal of *Mirtunjoy Bose* being for his costs. The High Court of *Calcutta*, by its decree, dated the 29th of *November*, 1862, confirmed, with some slight variations, the decree as to the Company's paper, directing the *Moonshee* to restore the papers, to the amount of Rs. 82,000, which remained in his hands; and to replace the others by the purchase of Company's papers, to an amount equal to that of the missing papers, but reversed the Judge's decree as to the Rs. 20,511 cash. It confirmed, however, the decree as to the property held by the Appellant, *Jodonath Bose*, making him also responsible for the mesne profits. And it further decreed the conveyance to the Respondent, by *Mirtunjoy Bose*, of the immovable property held by him. Against this decree the Appellants, *Moonshee Buzloor Ruheem* and *Jodonath Bose*, have severally appealed to Her Majesty. No appeal has been preferred by *Mirtunjoy Bose*.

The restitution suit was tried by the Principal *Sudder Ameen* of the Twenty-four *Pergunnahs*, who, by his decree, dated the 28th of *December*, 1860, dismissed it with costs. On appeal, the High Court of *Calcutta* confirmed that decision by its decree of the 25th of *July*, 1863. The *Moonshee* has appealed against both these decrees.

His remaining appeal is against a decree of the High Court, made on the 13th of *February*, 1863, in another suit instituted against him by his Wife. The object of that suit was to recover from him a Company's paper for Rs. 10,000, for which, as she alleged, she had inadvertently omitted to sue in the property suit. Objections, which will be hereafter considered, were taken to the maintenance of this fresh suit, and

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

7/.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

7/.

SHUMSOON-  
NISSA BEGUM,



1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

were allowed by the *Zillah* Judge. But the High Court reversed his decision, and remanded the cause for trial on the merits.

Having thus stated the general history and scope of this unfortunate and complex litigation, their Lordships will proceed to deal first with the appeals in the property suit. The Respondent having preferred no appeal against the decree of the High Court, her claims, in respect of the movable property, must be taken to be now reduced to one for the Government securities, to the amount of Rs. 2,34,800, which the *Moonshee* has been ordered to restore or replace. And their Lordships will begin by considering, whether the decrees under appeal can be supported against him in that respect.

That all these securities came to her hands whilst she was an inmate of his *Zenanah*; that they all passed from her to him; that some of them remain in his possession; and that others have been traced to his Creditors,—is incontestable. That she came to his house a wealthy woman, and left it almost destitute, admits of no doubt. And it can scarcely be denied that transactions of this nature and magnitude between Husband and Wife, with such a result, require a full and clear explanation on the part of the former, supported by such evidence as shall satisfy a Court of Justice that they were conducted fairly and properly, and with a due regard to the rights and interests of the Wife. Her case is, that the securities were entrusted to him for a particular purpose, viz., that of receiving the interest on them for her, and that though they may have been indorsed, she never meant to transfer the property in them. His case is, that he purchased them from her on several occasions, and that on their indorsement and delivery he paid her.



the full value for them. The principle of the judgments of the Courts below seems to be, that although the Wife may have failed to establish affirmatively the precise case alleged by her, her Husband, having admitted the receipt of the securities from her, was bound to show something more than mere indorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *banâ fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships are clearly of opinion, that this is a sound principle, and in accordance with the long-established practice of the Courts in *India*. The Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Mahomedan and a Hindoo woman; nay, that in all that concerns her power over her property, the former is by law more independent than an English woman of her Husband. It is no doubt true that a Mussulman woman, when married, retains dominion over her own property, and is free from the control of her Husbaad in its disposition; but the Hindoo law is equally indulgent in that respect to the Hindoo Wife. It may also be granted that in other respects the Mahomedan law is more favourable than the Hindoo law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a Law, which, with the religion on which it is chiefly founded, is spread over a large portion of the Globe, any inference as to the capacity for business of a woman of a particular race or country. In *India* the Mussulman woman of rank, like the Hindoo, is shut up in the *Zenannah*, and has no communication, except from behind the *Pur-*

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.



1867.

MOONSHEE  
BUZLOOR  
RUHFEM

7.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

7.  
SHUMSOON-  
NISSA BEGUM.

*dah*, or screen, with any male persons, save a few privileged relatives or dependants; the culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a Husband may be presumed to be likely to exercise over a Wife living in a such a state of seclusion. Their Lordships must, therefore, hold that this Lady is entitled to the protection which, according to the authorities, the law gives to a *Purdah-nusheen*, and that the burden of proving the reality and *bonâ fide* of the purchases pleaded by her Husband was properly thrown on him. They will proceed to consider whether the Courts below were right in holding that he has failed to prove his case.

The transactions are five in number, three of them being in the year 1848. On the 20th of *May* in that year, she is said to have sold to her Husband the two papers for Rs. 9,500 and Rs. 7,000, which she received on a compromise of a suit with her step-mother, *Ashruffnissa*. On the 27th of the same month she is said to have sold to him all the papers specified at the foot of his answer, which make up the sum of Rs. 1,03,800, except a paper for Rs. 11,300, which is said to have been sold on the 12th of the following month. These exhaust all the papers claimed, which formed part of her original share of her Father's estate. The papers for Rs. 1,14,500, which she received in 1853 from the estate of her Sister, are said to have been sold on two occasions in 1855, viz. papers for Rs. 32,500, on the 2nd of *March*, and papers for Rs. 82,000, on the 2nd of *July* in that year.

These several transactions are sworn to by various witnesses, of whom most, if not all, are or have been dependants of the Appellant. There may be slight



discrepancies in their testimony, but its general effect is, that on each occasion money, being the full value of the papers purchased, passed in cash or notes from the Appellant to the Respondent. The Appellant has himself deposed to the same effect, and has produced certain *Khatta* Books in corroboration of his testimony. The evidence, if believed, is sufficient to establish his case.

Both the Courts below have, however, disbelieved these witnesses, and have cast discredit on the Books, as being unlike those, which were likely to be kept in order to record the transactions of a person in the Appellant's position. The *Zillah* Judge, obviously a Gentleman of experience and ability, appears to have tried the cause very carefully; and their Lordships cannot but feel the difficulty of holding against his judgment,—confirmed, as it is, by that of the High Court,—that either the witnesses or the Books, considered by themselves, are trustworthy. In what degree, then, do the other facts and proceedings proved in the cause tend to confirm or to cast doubt upon their testimony?

The earliest in date are the applications for a Certificate under Act, No. 20 of 1841. It appears that a difficulty had arisen in the way of drawing the interest on the two Company's papers for Rs. 9,500 and Rs. 7,000, which stood in the name of *Moonshee Hossein Ali*, the Respondent's Father. The Respondent applied for a Certificate, which is in the nature of letters of administration to his estate, on the 5th of *May*, 1848. Her application was refused, but the grounds of the refusal do not appear. The transfer of these papers to the Appellant took place on the 20th of *May*; and on the 2nd of *July* the Appellant pre-

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.



1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

sented to the *Sudder Dewanny Adawlut* his petition, supported by a petition from the Respondent, complaining of the Judge's order of the 5th of *May*, and praying that a Certificate might be granted to him in her stead. The only bearing of these documents upon the present suit is, that in his petition the Appellant describes himself as the purchaser, and the Respondent as the seller of these papers, and that the Respondent in her petition says, "Owing to my having sold to *Buzloor Ruheem*, by an indorsement, the above-mentioned papers, etc." The importance of this as an admission is obviously very slight. We do not know,—and this is an observation which applies to all the other evidence of this kind,—how or by whom the proceeding in question was explained to her, or to what extent she had been informed of the significance of her acts in these Courts. And taking the admission at its highest, it would show only that for some cause or another, possibly only in order to facilitate the receipt of interest, the apparent ownership of the notes had been transferred from her to her Husband as upon a sale and purchase,—the only way, in truth, in which it could be done, since the Treasury in *Calcutta* takes no notice of trusts. This proceeding throws little (if any) light upon the nature of the actual transactions between the Appellant and his Wife.

The proceedings next in order of date that are relied upon are those in the execution suit, which began in *September*, 1848, and was finally disposed of in *May*, 1850. These relate more to part of the lands now held in the name of the Appellant, *Jodonath Bose*, the title to which will be hereafter considered, than to the Company's paper. It may, however, be well to



state their nature here. *Oomdatunnissa* having, in the course of the protracted litigation of this family, obtained a decree against the Respondent for the small sum of Rs. 671 : 13 : 1, took out execution against her share in one parcel of the lands inherited from her Father. The Appellant, the *Moonshee*, intervened as stating that the lands seized, as well as the other Objector, lands belonging to the Respondent, and these Company's papers, had been, before the execution, sold and transferred to him ; and that the Respondent, the judgment debtor, had no interest therein. His objection was overruled by the Judge on the 12th of *January*, 1849. He brought a regular suit to impeach that decision, to set aside the execution, and recover the property sold under it. That suit was dismissed on the 21st of *May*, 1850, on the ground that the alleged transfer of the Respondent's properties to the Appellant was collusive, and in fraud of her judgment Creditor. The chief bearing which these proceedings have upon the title to the Company's papers is that, in the answer filed by the Respondent in the regular suit, she stated that, after her marriage with the Appellant, fearing lest her properties should be wasted by her Agents, she disposed of the same to her Husband, and deposited the value thereof for the benefit of her children. Now, as that answer was filed long before any disagreement had arisen between the Appellant and Respondent, it can hardly be doubted that, if not actually prepared under his direction, it was at least filed with his concurrence. And it is to be observed that this statement is by no means consistent with the case now made by him of sales out and out to him, in order to raise money to meet the Respondent's debts and other necessary expenses.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.



1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

It suggests a different motive for the sales, and treats the proceeds as remaining in the hands of somebody or another for the benefit of her family. The sales, too, having been found to be collusive and unreal transactions, are quite consistent with the supposition that the Lady was persuaded into making them upon the suggestion that she would thereby defeat her Creditor, and that they were merely colourable, and made for that purpose. These proceedings tend more to discredit than to support the case now made by the Appellant of absolute sales of these securities to him, and of the actual payment by him, out of his own funds, to the Respondent of the purchase money at the dates of the several purchases.

That case suggests the questions so much insisted upon in the Courts below, *viz.* first, why should the Appellant wish to purchase these large amounts of Company's paper, and how was he able to pay for them? and secondly, why should ~~the~~ Respondent wish to sell her Company's paper, and how has she disposed of the proceeds of it? What answer does the evidence give to these questions?

The Appellant is no doubt shown to be a *Zemin-dar* possessed of considerable estates. But the evidence tends to show that, at the time of his marriage, and at the date of the earlier, at least, of these transactions, he was, like many landed proprietors, an embarrassed man. He and his Brother owed large sums to one *Ramchand Mookerjea*, and to *Ashotosh Day* and *Promothonauth Day*. These were secured by Bond and by judgments confessed, probably on warrant of attorney, in the Supreme Court, of which one bore date the 27th of *March*, 1845, and was for C. Rs. 1,48,000, and the other, dated the 30th of



*June*, 1846, was for C. Rs. 1,00,000. The precise amounts due on these judgment debts are not shown, but it is pretty clear that neither judgment, at the time of the earlier transfers of the Respondent's papers, was satisfied. It is admitted by the Appellant that most of the Company's paper, which, he says, he purchased on the 27th of *May* and 12th of *June*, 1848, were, on the 6th of *July*, transferred by him to *Ashotosh Day*, in payment of one of these debts. He and his brother were also, at this time, bound, under an Order of the Supreme Court of the 12th of *April*, 1848, to pay into Court the sum of Rs. 62,000. It is not credible that a person under these liabilities should be purchasing Government securities, bearing a rate of interest considerably lower than that at which his debts were running on,—securities which, if the necessity for selling them existed, might have been sold through a Broker in the market.

Again, the Appellant's case is, that the Respondent, when she married him, was herself in debt; that she afterwards required large sums for the marriages of her children and other family ceremonies; that she sold her Government securities in order to meet these necessities, and applied the proceeds in meeting them. He is driven to this allegation, because, as it is clear that she carried nothing with her out of his house, it would be still more difficult to support a theory that the money remained with her in some other form of investment. It is to be observed, however, that some of his own witnesses assign a different motive for the sale. Some of them say that she sold in order to get rid of difficulties caused by the Company's papers standing in the name of a *Purdah*-

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

7.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

7.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,

AND

JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

*nusheen*. Others say, as she says herself in her answer in the execution suit, that she was afraid of being cheated by her Agents. That the Respondent, during her seven or eight years of cohabitation with the Appellant, must have incurred considerable expenses in respect of her children by the first marriage, and for other family purposes, is pretty certain; but that she should have expended upwards of two lacs of rupees, the proceeds of these Company's papers, over and above the other property, which, at one time, she unquestionably possessed, is not very credible. It is to be remembered also that, on the assumption of the Courts below, she had the interest of these Company's papers wherewith to meet her necessary expenses. It is inconceivable that if these very large sums had been expended in the payment of debts, and for the other purposes alleged, the Appellant should not have been able to give better proof of the fact. It may suit his present purpose to profess that he had little personal connection with the management of her affairs; but the evidence, and in particular his petitions of the 27th of *October*, 1854, and the 4th of *December*, 1855, are strong to show that this was not the case. He there represents himself as active in the management of her property and interests.

The first of these documents is, in various particulars, strangely inconsistent with the case which the Appellant now sets up. He is there defending himself from a charge, made before the Magistrate, of having confined his Wife, and having refused to give up to her not merely the Company's papers derived from *Nujmunnissa*, which, according to his case, would then be still in her possession, but also Company's papers to the amount of Rs. 80,000 or



90,000, which, according to his present case, he had long before 1854 purchased from her; yet he does not say a word of this purchase. He covers the whole charge with the general answer, "The entire property of *Shumsoonissa Begum* being her own property, and my entire property being mine, what ground could there exist between her and me that I should confine her?"

We have hitherto considered the evidence with reference to the alleged sales of the Government securities generally. Some parts of it, however, suggest considerations which apply exclusively to the alleged transactions of 1855 and the transfer of the papers for Rs. 1,14,300. It may be, that the means of the Appellant to make these alleged purchases had then been further diminished by the litigation in which he appears to have been engaged with his first Wife, and by the decree which she obtained against him. On the other hand, he may have been in more prosperous circumstances than he was in 1848. But if he, so late as the months of *March* and *July*, 1855, paid to the Respondent the value of these papers, it is almost incredible that he should not be able to give some better explanation how she disbursed those large sums between those dates and the following *December*, when she left his house destitute. Again, his petition of *June*, 1854, discloses a state of things which is far more consistent with the Respondent's case, that she made over to him these Company's papers in 1853, as soon as she received them, than with his, that they were not transferred to him until 1855. It shows that in *June*, 1854, a petition had been presented to the Magistrate, complaining of his ill-treatment of his Wife. He, no doubt, denied the charge, and treated it as emanating, not from his Wife, but

1867.  
 MOONSHEE  
 BUZLOOR  
 RUHEEM  
 v.  
 SHUMSOON-  
 NISSA BEGUM,  
 AND  
 JODONATH  
 BOSE  
 v.  
 SHUMSOON-  
 NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

71.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

from discharged servants ; and the Magistrate then considered that the charge was unfounded. But when light is thrown upon this transaction by what subsequently happened, by his ill-usage of the Respondent, which is proved, and by her release from the house by the Magistrate, on the subsequent petition of 1855, it is difficult to resist the conclusion, that the quarrel between the Husband and Wife had begun in 1854 (the date to which her plaint assigns its commencement), or, at all events, that in *July*, 1855, there must have been a state of feeling between them which would make a voluntary sale of her property to him a most improbable transaction. If he did, so shortly before their final separation, obtain a transfer of those securities to himself, the burden of showing that he did so righteously is assuredly made heavier.

Again, the evidence of ill-usage which has been given in this suit seems to have a further bearing upon the issue between the parties which is now under consideration. We have not now to consider, whether what he did was within, or in excess of, the marital powers of a Mussulman Husband. It is sufficient to say that very harsh treatment, and a restraint from which the Magistrate saw fit to release her, are proved, and that she left the house in circumstances to which no native woman of her rank, who was not suffering under a sense of intolerable wrong, would have exposed herself. Now, what was the cause of this grave quarrel ? Her account of it is more probable than his, if indeed he has given any. It seems more likely that he should have attempted by harsh measures to frighten her out of a just demand, than that he should have met, in that way,



one which was without foundation. Her conduct, too, if the quarrel had begun in 1854, has ever since been consistent ; his, as has been shown above, has been inconsistent.

It would, doubtless, have been more satisfactory if the Respondent had thought fit to support her claim by her own testimony. Her abstaining from so doing certainly affords an objection to her case deserving of serious consideration ; and their Lordships do not think that it is altogether removed by the suggestion of the strong repugnance felt by native females in the Respondent's position to taking such a step. But the objection, though it may weaken, does not destroy the case made by the Respondent ; and their Lordships are of opinion, that, whatever weight may be due to it, it is quite insufficient to affect the conclusions in her favour to be drawn from the facts and circumstances of the case, which have been already adverted to.

The admission of the Tutor, a witness produced on the part of the Respondent, to the effect that on the transfer to which he speaks he saw money pass, is also a circumstance in the Appellant's favour. But, if the witness has spoken the truth about the money, it is to be remembered that the transaction to which he speaks was that of the 27th of *May*, 1848, when it may have been desired to make a colourable sale for the purpose of defeating the execution in the manner shortly afterwards attempted.

Their Lordships, then, after carefully weighing the evidence and considering the able arguments addressed to them, have come to the conclusion, that the burden of proving *bonâ fide* purchases of these Company's papers was properly thrown on the Appel-

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

7.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.



1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

lant ; that he has failed to do so, and that no ground has been shown for disturbing the concurrent judgments of both the Courts below on this part of the case.

The next question for consideration is that raised by the appeal of *Jodonath Bose*, as well as by that of the *Moonshee*, viz. whether that portion of the decree under appeal, which directs the reconveyance to the Respondent of the immovable property held by *Jodonath*, and the payment to her of the mesne profits by both the Appellants, can be supported.

The property in question consists of certain shares in two gardens, of which the entirety formed part of the estate of *Moonshee Hossein Ali*. They are known as the *Dum-Dum* garden and the *Narain Mundul* gardens, and, like the rest of the estate, were divided amongst the coheirs in twenty-fourth shares. Of the first, the decree gives to the Respondent sixteen shares, or two-thirds of the whole, comprising both her original share and the share which she inherited from her Sister. Of the other, it gives her only the eight shares inherited from her Sister, her original share having passed, under an execution sale, into the hands of a stranger to the suit.

The history of the *Dum-Dum* garden, after the death of *Moonshee Hossein Ali*, and its division amongst his heirs, is this :—As early as 1843, *Boalli* sold his five shares, and *Ashruffnissa Begum* sold her one share to one *Dilrus Begum* for Rs. 3,000. These six shares were conveyed by one Bill of sale, dated the 29th *Bysack*, 1250. On the 22nd of *May*, 1848, the Respondent executed a Bill of sale, by which she purported to convey her original eight shares of this



garden to her husband, in consideration of C. R. 2,000. On the 15th of *August*, 1848, he, by an Indenture in the English form, conveyed these eight shares to *Dilrus Begum*, in consideration of C. R. 4,000. On the 20th of *July*, 1853, *Dilrus Begum*, by a Bill of sale, conveyed both the sixth shares which she had acquired from *Boalli* and *Ashruffnissa Begum*, and the eight shares which she had acquired from the Appellant, the *Moonshee*, to one *Jegree Khanum*, for Rs. 6,000; and on the 27th of *September*, 1853, *Jegree Khanum* conveyed all these fourteen shares to the Appellant, *Jodonath Bose*, for Rs. 4,000. On the 9th of *January*, 1854, the Respondent executed a Bill of sale, purporting to convey the one-third part of this garden, which she had inherited from her Sister, to *Jodonath Bose*, for Rs. 2,000. The Appellant, *Jodonath Bose*, therefore holds twenty-two shares of this garden,—eight under a direct conveyance from the Respondent; eight under a title, founded on her conveyance to her Husband, but strengthened by the mesne conveyances; and six under a title, dating from 1843, and unimpeached, at least in this suit.

In *May*, 1848, the Respondent conveyed her original eight shares of the *Narain Mundul* gardens to her Husband; this property was the subject of the seizure which gave rise to the execution suit; and the sale having been declared fraudulent as against the judgment Creditor, these shares were purchased by the judgment Creditor, and cannot now be followed.

On the 12th of *May*, 1855, the Respondent executed a Bill of sale, purporting to convey to the Appellant, *Jodonath Bose*, in consideration of Rs. 1,500, the eight shares of this garden, which she

1867.  
 MOONSHEE  
 BUZLOOR  
 RUHEEM  
 v.  
 SHUMSOON-  
 NISSA BEGUM,  
 AND  
 JODONATH  
 BOSE  
 v.  
 SHUMSOON-  
 NISSA BEGUM.



1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
7.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

had inherited from her Sister. That transaction is impeached. He had previously acquired part of the share of *Boalli* in this garden, having inherited it from his Brother, *Koylas*, who, in 1850, purchased it at an execution sale. His title to this portion is not impeached.

The substantial issue on this part of the case is one between the Respondent and *Jodonath Bose*. It is obvious, therefore, that the principle upon which, on the trial of the issue already considered, the burden of proof was shifted from the Plaintiff to the Defendant, is not necessarily applicable to the trial of this issue. The Respondent comes into Court seeking to be relieved from the effect of her own conveyances, the execution of which she does not dispute, against one who if not an absolute stranger, stands in no fiduciary relation to her; and it lies under her to establish her right to that relief. Has she done so?

She has proved that *Jodonath Bose* is the servant of her Husband. She has produced three witnesses, *Gholam Arub*, *Gholam Ruhman*, and *Sheik Takee*, to prove that her Husband is the person who is really in the possession, or in the receipt of the rents and profits of the property. But nothing can be less satisfactory than the testimony of these witnesses, of whom the first is her Manager; the second, a Tailor; and the third, a menial servant; none of them having any connection with the lands.

The evidence of possession given on the other side, by *Ryots* and others, may not be altogether trustworthy; but, such as it is, it outweighs the loose statements of these three witnesses. Some of the inferences to be drawn from the conveyances from



her to her Husband are also favourable to the Respondent's case ; but these apply only to that portion of the property claimed, which consists of her original share in the *Dum-Dum* garden.

It may be conceded that the convayances from her to her Husband in 1848, considered with the light reflected on them from other parts of this case, and in particular from the proceedings in the execution suit, could not stand. It may also be conceded that if the question were between her and her Husband, he ought not to be permitted to say that she is bound by her fraudulent conveyance, since she may be presumed to have executed it under his influence or pressure. And if the property had passed directly from him to his dependant, the presumption that the latter is a mere Trustee for him might be stronger than it is.

But what are the facts proved ? This portion of the property in dispute passed apparently by sale from *Moonshee Buzloor Ruheem* to *Dilrus Begum*. It remained with her for nearly five years ; was sold, ostensibly at least, by her to *Jeegree Khanum*, from whom two months later it passed to *Jodonath Bose*. These intermediate conveyances are treated in the Courts below, and in the argument before their Lordships, as mere "circuity of fraud : " and it has been argued that we have no proof who *Dilrus Begum* and *Jeegree Khanum* are, or, indeed, that there ever were such persons. But what proof, on the part of the Respondent, is there to support these arguments ? On the other side, there are witnesses who state, that *Dilrus Begum* was the Wife of the *Nawab* of *Chitpore*, a well-known person, and that *Jeegree Khanum* was a Wife or concubine of apparently the same person. The conveyance to *Dilrus Begum* was by English deed, prepared and

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

7/.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

7/.

SHUMSOON-  
NISSA BEGUM.



1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

executed in the office of a respectable English Attorney, acting apparently for the purchaser. That circumstance afforded the means of investigating that transaction. But no attempt has been made to do so. Again, that *Dilrus Begum* was a real personage, not necessarily connected with the Appellant, the *Moonshee*, is placed almost beyond a doubt by the undisputed fact that in 1843, several years before the second marriage of the Respondent, the six shares of this garden had been conveyed to her by *Boalli* and *Ashruffnissa*. What, again, was the motive for this "circuitry of fraud?" If *Dilrus Begum* held five years' *Benamee* from the *Moonshee*, why raise suspicion by transferring the property from her to his known dependant, *Jodonath Bose*? Sir *Roundell Palmer* insisted strongly on the fluctuations in the amounts of the purchase-money for which the different instruments purported to convey the same property, as a badge of fraud. The first transaction, which we may admit to have been fictitious, expresses a consideration which, on a comparison with the price for which the six shares were sold in 1843, seems to be below the real value of the property. Tried by that test, the sum of Rs. 4,000, for which it was conveyed to *Dilrus Begum*, would be about the true value. This fact, taken by itself, tends to support the reality of the sales to *Dilrus Begum*. Again, if she sold for Rs. 6,000, property which had cost her Rs. 7,000, the difference is not greater than might be accounted for by the necessities of the Vendor, or by a diminution in the value of the property in the period during which it remained in her hands. The further reduction of the price to Rs. 4,000, in the sale to *Jodonath Bose*, is certainly a more suspicious circumstance. It is not, however, one which



seems to go very far to supply any defect of proof on the part of the Respondent. It is not impossible that *Jeegree Khanum* may have found that she had made a bad bargain, or that *Jodonath Bose* may have made an extremely good one. On the other hand, if the transactions were fictitious, and the price cost the professed purchaser nothing, it is not easy to see why an adequate consideration was not expressed in the conveyance. There seems to have been no inquiry or cross-examination on this point in the Courts below.

Again, what is the case proved in respect of the conveyances from the Respondent herself to *Jodonath Bose*? She is proved to have executed these conveyances. She has not met this fact fairly in her pleadings. In the original plaint there is no mention of *Jodonath Bose's* title; and on the face of the supplemental plaint it is not very clear whether she treats the conveyances as forgeries, or admits the execution and impeaches their effect. She has certainly not stated on what grounds she impeaches them, nor has she come forward as a witness to explain her execution of them. It lay upon her to do so; to show by her own or other testimony under what circumstances they were procured from her, and to rebut the evidence that the consideration money passed to her. Again, the purchase of these parcels of land by *Jodonath Bose* is not wholly improbable. The purchases are not beyond the means of a person in that rank of life. He already held portions of both gardens by titles not deduced from the Respondent, and unimpeached. The first conveyance from the Respondent was executed in *January, 1854*, when the *Moonshee* was absent from home and at *Singapore*. The *Zillah Judge* treats the circumstance of his absence as

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

indicative of fraudulent forethought and contrivance. His presence probably would have afforded the inference of pressure and undue influence. The habit may be superinduced by the manifold cases of fraud with which they have to deal; but Judges in *India* are perhaps somewhat too apt to see fraud everywhere. The second conveyance was in *May*, 1855. At that time the quarrel with her Husband had, according to the Respondent's case, begun. She is not likely to have executed this instrument voluntarily at his instigation. She has not shown that she was forced to do it. And, on the other hand, it is not improbable that in the circumstances in which she thus stood, she may have been glad to raise the comparatively inconsiderable sum which is stated to have been the price of the property.

On the whole, then, their Lordships are of opinion, that the Respondent has failed to show a sufficient title to recover any of the shares in these gardens from the Appellant, *Jodonath Bose*. The habit of holding land *Benamee* is inveterate in *India*; but that does not justify the Courts in making every presumption against apparent ownership. This principle was enforced by this Committee in a recent case (*a*). Their Lordships do not deny that in this particular case the connection of *Jodonath Bose* with the other Appellant, the proved conduct of the latter towards his Wife, and other circumstances, threw some cloud of suspicion over the title to these parcels of land. But such suspicions are not proof. Their Lordships think that the Judges of both Courts below have given too much weight to them; that they have not

(a) *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty*, *ante*, p. 28.



sufficiently considered in what degree the burden of proof lay upon the Respondent; and that when the proofs which she ought to have given and might have given were defective, they have allowed the deficiency to be supplied by presumptions and inferences which the facts do not altogether warrant. Their Lordships cannot, therefore, recommend Her Majesty to confirm this portion of the decrees in the "Property suit."

As the third suit also concerns property, and the point raised by the appeal in it is very short, their Lordships think it will be convenient to dispose of it before they proceed to consider the appeal in the "Restitution suit." Two objections were taken to the maintenance of this suit. It was pleaded, first, that the Respondent's claim was barred by the law of limitation; and, secondly, that she was precluded from suing to enforce it by the 7th section of Act, No. VIII. of 1859, which provides that "if a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." From the plaint it appears that the Company's paper for Rs. 10,000, which is the subject of the suit, was specified in the petitions for a Certificate under Act, No. XX. of 1841, already referred to, together with the papers for Rs. 9,500 and Rs. 7,000, which are included in the Respondent's demand in the "Property suit," and that her claim respecting it is precisely the same as her claim for the other two papers. The only reason she assigns for not suing for it in the former suit is, that "as she was a *Purdah-nusheen* and unacquainted with reading and writing, she could not ascertain anything about the aforesaid Government

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

paper and the interest of the same." She says she discovered her mistake in *July*, 1859, and insists that her cause of action arose at that time. The *Zillah* Judge held that the second objection was fatal to the suit, which he accordingly dismissed on that ground.

The High Court has reversed this decision, for the following reasons:—They hold with him that the omission to include this item in the first suit was an oversight; that she knew of the existence of this paper before she brought her first suit, and might have included it therein; and that the real question to be decided was, whether that omission, neglect, or oversight was sufficient to bar her present claims under the law fairly applied. This question they decide in the negative, on the ground that it was clear she was not actuated by any fraudulent or dishonest motive; that the stamp paid on the first suit would have covered also this paper; that she cannot have omitted this claim in order to bring the case within the cognizance of a particular Court; and that although it may be desirable for the ends of justice that the various items claimed by a Plaintiff should form the subject of one single action, yet there was nothing in the law to make it imperative upon her to include every item of such a claim as hers in a single suit.

To these reasons their Lordships cannot assent. If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. The words of this law are,—“If a Plaintiff relinquish or omit to sue for any portion of his claims.”



It plainly includes accidental or involuntary omissions as well as acts of deliberate relinquishment. In their Lordships' opinion, the only ground on which (if at all) the judgment of the High Court could be supported, is that which is somewhat doubtfully expressed by the Judges in the following sentence:—"Nor do we think that under the circumstances of the case, the Plaintiff may not fairly plead that she has a distinct and separate cause of action for the recovery of this piece of paper made over to the Defendant on a particular date." Their Lordships think that the correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit, and they have accordingly considered whether the present suit can be maintained on that ground. But the cause of action in the former suit of the Respondent seems to them to be the refusal by the Husband to restore, or his misappropriation of, the Wife's property, which she says she intrusted to him. There is nothing to distinguish the deposit of this particular Company's paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of her present plaint to have been omitted from it, for no other reason than the very insufficient one before mentioned. If she was justified in instituting a separate subsequent suit for this particular Company's paper for Rs. 10,000, she would have been equally justified in making each one of the Company's papers which are comprised in the "Property suit" successively the subject of an independent suit. Their Lordships are of opinion, that

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

the ruling of the *Zillah* Judge on this point was correct, and that the suit was properly dismissed. This being their view, it is unnecessary to say anything on the question of limitation. They are disposed, however, to think that the claim being founded on an alleged breach of trust, was not, as pleaded, subject to limitation, either under the old law or under Act, No. XIV. of 1859, which, the suit having been commenced in *December*, 1861, seems to be the law applicable to it. If the Plaintiff had failed to prove a breach of trust, but had established some other title to relief, the question of limitation might have arisen. But this could only happen upon a trial of the suit on its merits.

Their Lordships will now address themselves to the novel and difficult questions raised by the appeal in the "Restitution suit."

The first is, that which has been strenuously argued at the Bar, though it does not appear to have been raised in the Courts below, or even in the Respondent's case, viz., whether any suit by a Mussulman Husband will lie in the Civil Courts of *India* to enforce his marital rights under the Mahomedan law, by compelling his Wife, against her will (she being a free agent, and not detained by others), to return to cohabitation with him. If the law which regulates the relations of the parties gives to one of them a right, and that right be denied, the denial is a wrong; and unless the contrary be shown by authority, or by strong arguments, it must be presumed that for that wrong there must be a remedy in a Court of Justice. Of authority negating the jurisdiction there is none. It has been argued that the proper remedy, if there be one, is the denial of



maintenance to the rebellious Wife, or, at most, a suit for damages; because a suit to compel the Wife to return to her Husband, though obviously a more complete remedy than either of them, is in the nature of a suit for specific performance; and being founded on the contract of marriage, which the Mahomedan law regards as a civil contract, the Court entertaining the suit must be prepared to enforce all the obligations, however minute, which, according to that law, flow from the contract, whichever party has a right to insist upon them. And referring to the definition of some of those obligations, as given with somewhat prurient particularity in certain Mahomedan Treatises, the learned Counsel argued that it was impossible for Courts constituted like those of British *India* to exercise such a jurisdiction. It may be admitted that the Courts of *India* would properly decline to entertain such questions; although amongst the *Wahabees* of Central Arabia, or other communities in which the Mahomedan law is observed in its utmost strictness, the Magistrate might perhaps take cognizance of them. But this admission is not decisive of the question. The Canonists lay down many things concerning the relative duties of man and Wife which the Courts Christian, at least of our Country, feel compelled to leave as duties of imperfect obligation. They do not, therefore, refuse to enforce the broad duty of cohabitation. In the words of Lord *Stowell*, quoted by Mr. Attorney-General, "They are content to take the Wife to the Husband's door and to leave her there."

But how does this question stand upon the authorities? In the case of *Ardaseer Cursetjee v. Perozeboye* (6 Moore's Ind. App. Cases 390), in which it was here decided, that a suit for restitution of con-

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,

AND

JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

jugal rights between *Parsees*, and *à fortiori*, one between Hindoos and Mahomedans, did not lie on the Ecclesiastical side of the Presidency Courts, Dr. *Lushington*, in delivering the judgment of the Committee, says, "The Civil Courts in *India* can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, Hindoo law to Hindoos; but the Ecclesiastical law has no such flexibility." And after ruling that the Court below had not the jurisdiction which it claimed, he adds, "But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them (the *Parsees*). We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between the *Parsees*, nor what remedies may exist for the violation of them; but we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persons of this description." And he afterwards observes, "Such remedies (the remedies afforded by their own usages) we conceive that the Supreme Court on the civil side might administer; or at least remedies as nearly approaching to them as circumstances would allow." It may be said that those *dicta*, though proceeding from so high an authority, are extrajudicial, and merely indicate an opinion that suits of this kind might possibly be entertained by the Civil Courts of *India*. The Attorney-General, however, has cited positive authorities which support the jurisdiction, and shows the principles upon which it ought to be exercised. There are the cases of *Maulvi Abdul Wahab v. Mussumat Hingu*, decided in 1832, and reported in



5 *Ben. Sud. Dew. Ad. Rep.* p. 200; of *Mussumaut Aameena v. Kuttoo Khan*, decided in 1841 and reported 7 *Ben. Sud. Dew. Ad. Rep.* p. 27; and the case of *Kulleemooddeen v. Sona Chand Bibi*, decided in 1848 and reported in the Reports of the Bengal *Sudder Court* for that year, at p. 795. In the last of these cases the suit was dismissed on the ground that the marriage was not proved, but the jurisdiction was not questioned. The second case may be distinguishable from the present on the ground that the Wife was of tender years, and under the control of the co-Defendants in the suit. But in the first case the Wife was clearly of full age, and a free agent. The co-Defendant in the suit, though charged with harbouring her, had little more control over her than the co-Defendant in the present case had over the Respondent. The suit, which went through three Courts, was resisted by the wife on grounds personal to herself; and it was finally decided that, according to the Mahomedan law, by which the question was to be decided, the Plaintiff had a right to the possession of his Wife, and she was compelled to return to him. It does not very clearly appear by what process the judgment in this case, or in that of *Mussumat Aameena v. Kuttoo Khan* was to be enforced. From some passages it might be inferred that in the event of disobedience the Wife was to be given bodily into her Husband's hands. Whether this could be done under the new Act of Procedure, which now regulates the Civil Courts of *India*, may well be doubted. Disobedience to the Order of a Court directing the Wife to return to cohabitation would seem to fall within the 200th section of the Code, and to be enforceable only by imprisonment, or attachment of property, or both.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.



1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

Upon authority, then, as well as principle, their Lordships have no doubt that the Mussulman Husband may institute a suit in the Civil Courts of *Inaia*, for a declaration of his right to the possession of his Wife, and for a sentence that she return to cohabitation; and that that suit must be determined according to the principles of the Mahomedan law. the latter proposition follows not merely from the imperative words of *Ben. Reg. IV. of 1793, sec. 15*, but from the nature of the thing. For since the rights and duties resulting from the contract of marriage vary in different communities; so, especially in *India*, where there is no general marriage law, they can be only ascertained by reference to the particular law of the contracting parties.

The matrimonial law of the Mahomedans, like that of every ancient community, favours the stronger sex. The Husband can dissolve the tie at his will, subject to the condition of paying the Wife her dower and other allowances; but she cannot separate herself from him except under the arrangement called *Kolah*, which is made upon terms to which both are assenting parties, and operates in law as the divorce of the Wife by the Husband (*a*). It cannot, we think, be doubted that, whilst the tie subsists, his power over her is considerable. The cases already cited are to the effect that he may compel her to return to his House, if she has left it. We do not find this expressed in the *Hedaya*, which speaks only of her forfeiting her right to maintenance if she be disobedient or refractory, or go abroad without her Husband's consent, until she return and make submission

(*a*) See *Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa* 8 Moore's Ind. App. Cases, 379.



(Vol. I. Book IV. ch. xv. p. 394) ; but it seems implied throughout, that she, from the time she enters his house, is under restraint, and can only leave it legitimately by his permission, or upon a legal divorce or separation, made with his consent. In fact, the principle of keeping a man's *hareem* in seclusion and under his control, is so essential a part of the framework of Oriental society, that it is naturally assumed and taken for granted by the Mussulman expounder of the law.

1867.  
 MOONSHEE  
 BUZLOOR  
 RUHEEM  
 v.  
 SHUMSOON-  
 NISSA BEGUM,  
 AND  
 JODONATH  
 BOSE  
 v.  
 SHUMSOON-  
 NISSA BEGUM.

On the other hand, the law assures to the Wife considerable rights as against her Husband. She may insist on maintenance according to her rank and his ability ; and if he fails to give it, she may enforce that right before the *Kazee* (*Hedāya*, Vol. I, Book IV. chap. xv. sec. 1. pp. 393, 394). If he has power to keep her within the *Zenannah*, and to prevent access to her, subject to certain qualifications, he is bound to provide her with a separate apartment, exclusively appropriated to her use (*ib.* p. 402). As to personal violence, there are certainly passages in the *Hedāya* which, founded on a text in the *Koran*, imply that the Husband may use it for correction ; but this right of corporal chastisement is expressly said to "be restricted to the condition of safety ;" and it may be questioned whether these authorities go the full length of the *Futwa* at p. 14 of the record (see *Hedāya*, Vol. II. Book VII. ch. 6, pp. 75-81). The Mahomedan law, on a question of what is legally cruelty between Man and Wife, would probably not differ materially from our own, of which one of the most recent expositions is the following :—"There must be actual violence of such a character as to endanger personal health or safety ; or there must be a reasonable apprehension of it." "The Court," as Lord *Stowell* said,

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

in *Evans v. Evans* (a), "has never been driven off this ground."

If, however, it be granted that, according to Mahomedan law, the Husband may sue to enforce his right to the custody of his Wife's person; and that, if her defence be cruelty, she must prove cruelty of the kind just described, it by no means follows, that she has not other defences to the suit which would not be admitted by our Ecclesiastical Courts in a suit for the restitution of conjugal rights. The marriage tie amongst Mahomedans is not so indissoluble as it is amongst Christians. The Mahomedan Wife, as has been shown above, has rights which the Christian—or at least the English—Wife has not against her Husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the Husband altogether, or grant it only upon terms of his securing the Wife in the enjoyment of her personal safety, and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the *Kazee* by the *Futwa* (if the law, indeed, warrants such a jurisdiction), of selecting a proper place of residence for the Wife, other than her Husband's house.

Enough has been said to show that, in their Lordships' opinion, the determination of any suit of this kind requires careful consideration of the Mahomedan law, as well as strict proof of the facts to which it is to be applied. Has the present case been so tried and determined in the Courts below? Their Lordships are constrained to say, that this has not been the case. In the first place, they think that the *ratio decidendi* adopted by the Judges of both Courts

(a) 1 Hagg. Con. Rep., 37, *et seq.*



is erroneous. The Principal *Sudder Ameen* held, that oppression had been proved (the correctness of his conclusion will be hereafter considered). He did not then proceed to consider, whether the oppression was so far beyond the bounds of marital authority, under the Mahomedan law, as to constitute an answer to the suit. He seemed to think that, oppression once proved, the case was taken out of the Mahomedan law, and was to be decided on what the Court, upon general principles, might deem to be expedient for the security of the Wife's person. He then proceeded to argue, apparently without the slightest foundation of proof, that the Wife, having been ill-treated, had probably been unfaithful, and that if she were restored to her Husband, he was not unlikely to revenge himself by taking her life. He afterwards argued, with more reason, upon the danger of restoring her to one who had been decreed liable to pay her a very large sum of money.

The facts upon which the Judges of the High Court proceeded were, that the Magistrate had seen fit to release the Respondent from her Husband's house, and that a decree had passed against him for having made away with her property for a large sum, of which they overstated the amount. They appear to have considered that, according to the Mahomedan law, these facts were not an answer to the suit; and they then say, "This being so, are we required to decide this case in conformity with the principles of the Mahomedan law? Are we to compel the Defendant to return to her Husband, convinced as we are that she should not be forced to return? If, under the Mahomedan law, no Wife can separate herself from her Husband under any circumstances whatso-

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

ever, the law is clearly repugnant to natural justice, and we are not bound to follow it. The Mahomedan law giving no relief to a woman, be the conduct of the Husband ever so bad; it is a case to be disposed of by equity and good conscience. And on these principles we have no hesitation in saying, that the grounds upon which the Defendant has separated from her Husband justify her in that step."

The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Mahomedan law, but according to what is termed, "equity and good conscience," *i. e.*, according to that which the Judge may think the principles of natural justice require to be done in the particular case.

Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British *India*, and particularly to the enactment already referred to (Reg. IV. of 1793, sec. 15), which directs, that in suits regarding marriage and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which Judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision, that their law, the application of which has been thus secured to them, is to be overridden upon a question which so materially concerns their domestic relations. The Judges were not dealing with a case in which the Mahomedan law was in plain conflict with the general Municipal law, or with the requirements of a more advanced and



civilized society,—as, for instance, if a Mussulman had insisted on the right to slay his Wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own sense of what is just and fair, without reference to positive law, would let the Wife go free ; and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her Husband.

In what they have just said their Lordships must be taken to object only to the general supersession of the Mahomedan law as the *ratio decidendi* in cases of this description, which seems to them to be implied in the judgments under review.

They do not mean to lay down that it was sufficient for the decision of the case to show that, according to the Mahomedan law, the Husband has a right to the custody of his Wife, or that there was no answer to his suit unless it could be shown that the Wife had been separated from him either by *Talâk* or *Kolah*, either of which would dissolve the *vinculum*. This assumption, which seems to have been made by the Judges of the High Court, is, their Lordships think, erroneous. It seems to them clear, that if cruelty in a degree rendering it unsafe for the Wife to return to her Husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the Husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the Wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its inter-

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,

AND

JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

7.

SHUMSOON-  
NISSA BEGUM,

AND

JODONATH  
BOSE

7.

SHUMSOON-  
NISSA BEGUM.

ference by imposing terms on the Husband. But all these are questions to be carefully considered, and considered with some reference to Mahomedan law.

Before, however, any of these principles can be applied, the facts to which they are to be applied must be established by legal proof; and this, their Lordships are of opinion, has not been done in the present case. Besides the evidence on the futile and now abandoned issue about Freemasonry, there is little evidence in the cause.

The *Zillah* Judge's judgment in the "Property suit" was put in evidence. The fact, therefore, that the Appellant had been decreed liable to make good a large sum of money to the Respondent in respect of the property which he had misappropriated was established; but the proof of personal cruelty rests almost entirely on the proceeding of the Magistrate. That proceeding is neither one *inter partes* nor even a conviction of the Appellant upon a criminal charge. It was treated by the *Nizamut Adawlut* as being the record of an act done by a Police Officer, and not the judicial proceeding of a Magistrate. It is, therefore, difficult to see how, in strictness, it can be evidence at all against the Appellant; but at most it proves only that the Magistrate set the Lady free from what he considered improper restraint.

To establish a case of cruelty as a defence to the suit, the Respondent might have called the Magistrate, if then still in *India*, to speak to the state in which he found her when he set her free. She might also have given such evidence of her treatment as she adduced in the "Property suit," but which, whatever were her reasons for it, she did not adduce



in this suit. And, lastly, she might have given her own testimony, which it is most desirable to have on such an issue. She has failed to do any of these things; and it is impossible to say that the Courts below had before them in proof, the facts from which any Court could infer that a defence on the ground of cruelty had been established.

From what has been said, it must be obvious, that their Lordships are not prepared to affirm the decrees under appeal in this suit. They do not, however, feel themselves in a condition to make a final decree, which would put an end to this painful litigation. They will not visit upon the Respondent the mismanagement of her cause by sending her back at once to her Husband. Enough has been shown to render it doubtful, whether she can be restored to his *zenanah* with safety, at least whilst the relation of Debtor and Creditor continues to subsist between them, unless proper security for her protection is taken. It may ultimately turn out that she ought not to be sent back at all. Their Lordships must, therefore, unwillingly recommend that this cause be remitted to the High Court, with directions to put the same in a course of re-trial, and with power, if necessary, to amend the issues or frame new ones. If cruelty be relied upon as a defence, there should be a distinct issue as to the fact of cruelty.

Their Lordships, however, cannot help suggesting, for the consideration of the parties, that it is for the interest, the happiness, and the respectability of both to settle the questions still open between them by amicable arrangement rather than by further litigation. They have surely friends who might effect such an arrangement between them.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM

v.

SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE

v.

SHUMSOON-  
NISSA BEGUM.

1867.

MOONSHEE  
BUZLOOR  
RUHEEM  
v.  
SHUMSOON-  
NISSA BEGUM,  
AND  
JODONATH  
BOSE  
v.  
SHUMSOON-  
NISSA BEGUM.

Their Lordships have now only to recapitulate the several recommendations which they will humbly make to Her Majesty on these appeals. These are—

First; that the appeal of the Appellant, *Moonshee Buzloor Ruheem*, in the "Property suit," be dismissed, except so far as it relates to his liability to pay the mesne profits of the shares in the *Dum Dum* and *Narain Mundul* gardens jointly with the Appellant, *Jodonath Bose*; that the appeal of the last-named Appellant in the same suit be allowed; and that the decree of the High Court be amended, by omitting so much thereof as relates to the shares in those gardens, and by directing, in lieu thereof, that that portion of the Respondent's claim be dismissed with costs, and that the said decree be in all other respects confirmed.

Secondly; that in suit, No. 256 of 1862, the decree of the High Court be reversed, and that, in lieu thereof, the decree of the *Zillah* Judge dismissing the Respondent's suit, with costs, be affirmed, with the costs of the appeal in the High Court.

Thirdly; that in the "Restitution suit" the decrees of the High Court and of the Principal *Sudder Ameen* be reversed, and the cause be remitted to the High Court, with directions to have the same re-tried on fresh evidence, and with power to amend the issues, or to frame new issues, if they shall see fit to do so.

Lastly; that the Respondent should pay the costs of the appeals in suit, No. 256 of 1862, and in the "Restitution suit." That she should also pay the costs of the appeal of *Jodonath Bose* in the "Property suit." And that the Appellant, *Moonshee Buzloor Ruheem*, should pay the costs of his appeal in that suit.



CAVALY VENCATA NARRAINAPAH ... *Appellant*;

AND

THE COLLECTOR OF MASULIPATAM ... *Respondent*.\*

*On appeal from the High Court of Judicature at Madras.*

AN appeal in this case was heard by the Judicial Committee in 1860, to determine the right of the Respondent to seize an estate called the *Zemindary* of *Visunnapettah* in his Collectorate, belonging to the deceased *Zemindar*, *Varegondah Ramanappah*, as an escheat to the Government, for want of an heir to the person last possessed, when their Lordships decided in favour of the general right of the Crown to take by escheat the estate in question, subject, or not subject, to a mortgage charge on the *Zemindary*, alleged to have been created by the *Zemindar's* Widow, *Varegondah Lutchmedevammah*, after his decease, and remitted the

11th & 12th  
Dec., 1867.

*A.* made advances to a Hindoo Widow in possession, which were secured by a mortgage on the immovable estate of her late Husband, and the advances were applied by her to purposes for which she had power by the Hindoo law to charge or alienate her Husband's estate, without his heirs' consent.

Held, that *A* was entitled

\* Present :—Members of the *Judicial Committee*—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

as against the Crown, who took the estate by escheat on the death of the Widow for want of heirs, to possession of the estate under the mortgage, as security for the amount advanced and interest, subject to the equity of redemption by the Crown.

The *onus probandi* lies on the Mortgagee to prove, first, that the charge on the estate was the act of the Widow; and secondly, that the debt so charged was a competent act of the Widow; but the rule which throws the burthen of proof on the party who alleges payment to prove it, or that the debt is presumed to be satisfied, unless the contrary is shown by the Creditor, is not always to be strictly enforced, but is to be governed by the circumstances and probabilities of the case.



1867.  
 CAVALY  
 VENCATA  
 NARRAINA-  
 PAH  
 v.  
 THE COLLEC-  
 TOR OF MA-  
 SULIPATAM.

case to *India* for further inquiries. The Court having on the remit, heard the case, decided that there was a subsisting charge on the *Zemindary* in favour of the Appellant; an appeal was again preferred by the Respondent to Her Majesty in Council against that decision, when it was decided by the Judicial Committee, that the mortgage charge on the *Zemindary* in favour of the Appellant had not been sufficiently established, and that further evidence ought to be adduced on that point.

The circumstances under which the Appellant claimed the *Zemindary* in question, and under which the two former appeals arose, are stated in detail in the reports of those appeals (a).

The suit having been thus remitted to the High Court of Judicature at *Madras*, that Court on the 2nd of *May*, 1863, in order to carry into effect the Order of Her Majesty in Council, directed the following issues to be tried by the Civil Judge of the *Zillah* Court of *Guntoor*.

First, that the Civil Judge, having regard to the declarations contained in the Order in Council, dated the 6th of *January*, 1862, was to inquire and decide, whether the right of the Crown was absolutely defeated by the *Razenamah* in the pleadings mentioned. Secondly, to inquire and decide what advances, if any, were made by *Cavalay Vencata Lutchmiah*, the Father of the Appellant, to the Widow of *Varegondah Ramanappah*, in the plaint respectively mentioned, and whether all, or any, and which of such advances, were made for purposes for which, according to the Hindoo law, *Varegondah Lutchmedevammah* would have been entitled to alienate the

(a) 8 Moore's Ind. App. Cases, pp. 500 and 529.



estate in dispute, as against the next heirs of her Husband, if such there had been. Thirdly, further to inquire, what other property, besides the estate in dispute in this suit, *Varegondah* died possessed of, and, whether at the time when such advances, if any, were respectively made, *Varegondah* had any of such property; and, if so, whether the same was sufficient to answer the purposes for which the advances were made by *Cavalv Vencata Lutchmiah* to *Varegondah Lutchmedevammah*. Both parties being at liberty to adduce further evidence.

1867.  
CAVALV  
VENCATA  
NARRAINA-  
PAH  
7.  
THE COLLEC-  
TOR OF MA-  
SULIPATAM.

Both parties entered into evidence. The Appellant's evidence consisted of the depositions of witnesses in favour of the genuineness of the documentary evidence, which consisted, so far as the same is material to mention, of the following documents, numbered respectively as follows:—No. XIII. A *Karanamah* Bond, dated the 9th of October, 1804, alleged to have been executed by *Varegondah Ramanappah*, the last *Zemindar*, to three Obligees, mortgaging twelve villages of the *Zemindary* for a term of eight years, as a security for 1,100 *hous* or *pagodas*, and stipulating that the Mortgagees should receive the profits of such villages, and credit the surplus after paying the Revenue Assessment against the debt. This Bond bore an indorsement to the effect, that on the 24th of September, 1800, or 1810, *Kavali Seethiah* paid the balance of principal and interest due as per accounts, after deducting the payments already made. No. XIV. A mortgage Bond alleged to have been executed on the 28th of December, 1810, by the Widow to *Kavali Seethiah*, mortgaging thirteen out of the fourteen villages of the *Zemindary* as a security for 5924 $\frac{7}{8}$  *hous*, and interest, of which

1867.

CAVALY  
VENCATA  
NARRAINA-  
PAH  
7.

THE COLLEC-  
TOR OF MA-  
SULIPATAM.

879 *hous* were said to have been borrowed by the Widow, as per accounts, extending from the 29th of *February*, 1810. This Bond stipulated that the Mortgagee should receive the profits, and thereout pay the revenue assessment and outgoings, and apply the balance in discharge of the debt. The Bond also stated as follows, "we have received the former Bonds, &c., relative to our *Talug*, which you have returned to us." No. XV. A receipt, dated the 15th of *January*, 1811 (eighteen days after the date of the Bond), given by the Collector for Rs. 620. 6a. 3p., paid through *Kavali Seethiah* for the revenue assessment up to *November*, 1810. No. XVI. A Document, dated the 28th of *May*, 1813, purporting to have been executed by *Kavali Seethiah* to the Appellant's Father, acknowledging the payment by the latter of the balance of debt due to *Kavali Seethiah* under the Bond of the 28th *December*, 1810. No. XVII. A notice from the Collector, dated the 11th of *March*, 1811, stating that there was an arrear in the discharge of revenue assessment up to that date, amounting to 1,400. 11. 30 star *pagodas*, being the amount of revenue assessment for a whole year. No. XVIII. An *Arsi*, dated the 18th of *May*, 1822, and alleged to have been written by the Widow to the Collector, in which she stated, that up to that date, the debts on the *Zemindary* amounted to Rs. 20,000, and that she had borrowed large sums of money, and part of arrears of revenue due to Government. No. XXV. A Letter, dated the 30th of *October*, 1828, from the Collector to the Widow, stating that as she had not paid Rs. 1,033. 3a. 3p., the balance of the instalment due by her to the Government, he had ordered three of her villages to be



attached. No. XIX. A Letter, dated 24th of *November*, 1828, written by the Widow to the Appellant's Father, in which she referred to the latter having paid off *Kavali Seethiah*, and having, in 1817, given her assistance in paying the revenue assessment, and requested an immediate loan to meet the demands of the *Circar*. No. XX. A petition, dated the 7th of *January*, 1832, preferred by the Widow to the Board of Revenue, stating that she had given away the *Zemindary* to *Kavali Vencata Rajeswara Row*, the grandson of her elder Brother, to whom she was "indebted in a very large amount," and asking that the *Zemindary* might be registered in his name. This petition made no mention of any debt owing to the Appellant's Father. No. XXI. The Mortgage Bond of the 20th of *April*, 1838, executed by the Widow to the Appellant's Father, to secure Rs. 48,614. 13a. 6p., on which the Appellant founded his right to possession of the *Zemindary*, as against the Crown.

1867.  
CAVALY  
VENCATA  
NARRAINA.  
PAH  
v.  
THE COLLEC-  
TOR OF MA.  
SULIPATAM.

The Respondent examined witnesses, and produced documentary evidence, but neither the evidence of his witnesses nor the documents produced were found material to the points at issue.

The suit was tried by Mr. *William Elliot*, the Civil Judge of the Court of *Guntoor*, when that Judge, upon the evidence, came to the conclusion, that a great portion of the debt claimed by the Appellant was contracted, and the estate made security for it by the late Husband of the Widow, *Varegondah Lutchmedevamah*. That it did not appear to have been possible for the Widow to have paid off the debts left by her late Husband, or to provide for her own customary and requisite expenses, and, at the same time, to meet the demand of the Government on account of the fixed



1867.

CAVALY  
VENCATA  
NARRAINA-

PAH

v.

THE COLLEC-  
TOR OF MA-  
SULIPATAM.

revenue. That in 1841, the Widow being unable to pay the debt against the estate, which had accumulated to the amount of Rs. 67,444, up to the date of the *Razenamah*, alienated the estate, which was already security for the debt, and, under the circumstances of that period, did not appear to be worth more than the amount then due. For these and other reasons, the Judge was of opinion, that the alienation by the Widow was for legal purposes sanctioned by Hindoo law, and that the right of the Crown, as next heir to her Husband, was, therefore, absolutely defeated by the *Razenamah* in the pleadings mentioned. With regard to the second issue, the Civil Judge decided, that up to the date of the *Razenamah* filed in 1841, the amount due to the Appellant had, with interest, accumulated to Rs. 67,444. 12a. ; he had no *data* to go upon to enable him to fix any other amount than the above as the aggregate of sums really advanced by the Defendant's Father, with interest accruing thereon, or for declaring that they were advanced for other than legal purposes, as alluded to by him when considering the first issue. With regard to the third issue, the Judge was of opinion, that *Varegondah Ramanappah* died possessed of no property available for any purpose, except the estate in dispute, which, at his death, was not unincumbered.

From this decision the Respondent appealed to the High Court at *Madras* ; and on the 22nd of *January*, 1866, the appeal coming on to be heard before Messrs. *Frere* and *Innes*, two of the Judges of that Court, they recorded their judgment, finding, amongst other things, that the Widow, *Varegondah Lutchmedevammah*, was left at the death of the *Zemindar*, her Husband, in a very embarrassed position,



and that the mortgage then made by her, was executed *bonâ fide* in discharge of the debts which it recited, left by the *Zemindar* at the date of his death, and since necessarily incurred by the Widow; that there was good ground for believing that in 1822, the Widow, *Varegondah Lutchmedevammah*, was still indebted in the sum of Rs. 20,000 to the Appellant's Father, and that, in the absence of accounts and of other evidence, they could not feel satisfied that any part of the debt subsisting in 1822 was still subsisting in 1838, and being unable to feel satisfied from the evidence that the mortgage deed of 1838, which gave rise to the decree in the suit No. 18 of 1838, and the *Razenamah* by the Widow, dated the 5th of *April*, 1841, confessing the debt, and undertaking to pay it by instalments, was executed for a debt for which the Widow might lawfully have created a charge upon the estate without the consent of the next heirs of her Husband, if such there had been, or of any other then subsisting debt, they reversed the finding of the Civil Judge in regard to the points which the Order of Her Majesty in Council required them to determine, and they declared, that the right of the Crown to take by escheat was not defeated by the *Razenamah*, that from the death of the *Zemindar*, in 1810, up to the year 1813, advances were made to the Widow by Defendant's Father for purposes for which, according to the Hindoo law, the Widow would have been entitled to alienate the estate as against the next heirs of her Husband, if such there had been, and that on the 18th *May*, 1822, the balance due by the Widow upon these advances, with interest, was about Rs. 20,000, that in the year 1828 a

1867.

CAVALY  
VENCATA  
NARRAINA.

PAH

7.

THE COLLEC-  
TOR OF MA-  
SULIPATAM.

1867.

CAVALY  
VENCATA  
NARRAINA-  
PAHTHE COLLEC-  
TOR OF MA-  
SULIPATAM.

further advance was made for similar purposes of Rs. 1,033. 3a. 3p., and that at the times at which the advances before mentioned were respectively made, the Widow had not other estates of her Husband sufficient to answer the purpose for which the advances were taken and to which they were applied, that the Defendant had not shown what, at the date of the advances last mentioned, was the debt upon the former advances, or whether any such former debt still subsisted, that no advances were made from this date to the date of the mortgage deed (Exhibit, No. XXI.) in 1838; that the Defendant was bound to show, and had not shown, that the Widow was in debt to the Defendant's Father at the date of the execution of the mortgage deed, for advances made for the purposes aforesaid, and that the Plaintiff, on the part of Government was, therefore, entitled to take the estate by escheat, unencumbered with charges created in favour of the Defendant's Father and the Defendant, and that the parties should each bear their own costs.

The appeal was from this decree.

Sir *R. Palmer*, Q. C., and Mr. *Ayrton*, for the Appellant.

The decision of the High Court, so far as it differed from the decree of the *Zillah* Judge, was contrary to evidence. It was established, that the Widow, *Varegondah Lutchmedevammah*, had lawfully charged and alienated the *Zemindary* to secure a debt due by her Husband to the Appellant's Father, which debt would have bound the heirs of her Husband, if there had been any, *Hunoomanpersaud Pandey v.*



*Mussumat Babooee Munraj Koonweree* (a). Both the High Court and the *Zillah* Court having decided, that the debt so due to the Appellant's Father, was lawfully contracted, that the *Zemindary* was held by him in mortgage to secure the same in the year 1822, there was, therefore, no ground for presuming that the debt was not due with interest at the Widow's death, or that the debt was not further secured by the mortgage of 1838. The decree was clearly wrong in throwing the *onus probandi* on the Appellant. It was not for the Mortgagee's representative to show, that the debt secured by the mortgage had not been paid off. It has been proved, that at a certain date there was a debt due and a mortgage on the *Zemindary* executed to secure it; and further, that the Mortgagor, at a later period in 1838, acknowledged that such debt, with interest, still subsisted. Such evidence was sufficient to establish the claim. Neither can it be maintained that the Appellant was bound to prove every item of the account.

Mr. *Forsyth*, Q.C., and Mr. *Pontifex*, for the Collector of *Masulipatam*.

The Widow had no power to dispose of or mortgage the *Zemindary*, except in order to raise money for certain necessary purposes, defined by the Hindoo law; and no such exigency has been proved to exist in the several instruments of charge, including the mortgage of 1838, purporting to secure advances, made in respect of which the Widow had no authority to charge the *Zemindary*. The case of *Hunoomanpersaud Pandey v. Mussu-*

1867.

CAVALY  
VENCATA  
NARRAINA-  
PAH

v.  
THE COLLEC-  
TOR OF MA-  
SULIPATAM.

(a) 6 Moore's Ind. App. Cases, 393; and see Cases there collected, *ib.*, p. 407.

1867.  
 CAVALY  
 VENCATA  
 NARRAINA-  
 PAH  
 v.  
 THE COLLEC-  
 TOR OF MA-  
 SULIPATAM.

*mat Babooec Munraj Koonweree (a)*, relied on by the Appellant, is distinguishable from the present. There the question was as to the power of a Manager to charge the estate of a Minor, and, as it was for the benefit of the estate, the power of charging was upheld. It lies on those who claim under an alienation of real estate from a Hindoo Widow to show, that the transactions were within her limited powers, and for that purpose to prove by accounts and vouchers the necessity for and the due application of advances made to her, and no such proof in this case has been furnished. The instruments set up by the Appellant, and especially the alleged mortgage deed of the 20th of *April*, 1838, was simply a colourable contrivance for transferring the estate in spite of the Widow's disability.

20th Dec.,  
 1867.

The appeal stood over for consideration.

Judgment was now pronounced by

The Right Hon. Sir JAMES W. COLVILE.

This is the third appeal to Her Majesty in Council in this unfortunate case. On the first it was determined that the Crown, which is represented by the Respondent, was entitled to the *Zemindary* in question by escheat, subject to whatever interest the Appellant might have acquired therein by virtue of the transactions between his late Father and *Veregondah Lutchmedevammah*, the Widow of the last *Zemindar*. The Order in Council made on the second appeal, which bore date the 6th of *January*, 1862, amongst other things, declared, that the Crown, taking by escheat, had the same right to impeach the alienation of the

(a) 6 Moore's Ind. App. Cases, 393.



1867.

CAVALY  
VENCATA  
NARRAINA-  
PAH

v.

THE COLLEC-  
TOR OF MA-  
SULIPATAM.

Widow which the next heirs of the Husband (if such there had been) would have had; and that the Appellant, then the Respondent, was entitled to a charge upon the estate, and to be paid and satisfied thereout, the full amount of all such of the advances (if any) made by his Father to the Widow, as were made for purposes for which, according to the Hindoo law, she would have been entitled to alienate the estate against the next heirs of her Husband, in so far as she had no other estate of her Husband to answer such purposes—and by the same Order the cause was remitted to the *Sudder Dewanny Adawlut* of *Madras*, with directions to inquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the *Razenamah* relied on by the Appellant, and if not, to inquire what advances, if any, were made by the Appellant's Father to the Widow, and whether all, or any, and which of such advances, and to what amount, were made for the purposes for which, according to the Hindoo law, the Widow would have been entitled to alienate the estate as against the next heirs of her Husband, and whether the Widow had, when such advances were made, other estates of her Husband sufficient to answer such purposes.

The High Court sent down the issues so directed for trial in the *Zillah* Court. The judgment of the Civil Judge (Mr. *Elliot*) states very carefully the facts which he found to have been proved before him, and came to the following conclusions:—First, that the alienation by the Widow was for legal purposes sanctioned by the Hindoo law, and that the right of the Crown, as next heir of the Husband, was, therefore, actually defeated by the *Razenamah*; secondly, that

1867.  
 CAVALY  
 VENCATA  
 NARRAINA-  
 PAH  
 v.  
 THE COLLEC-  
 TOR OF MA-  
 SULIPATAM.

the sums due for such advances amounted in *April*, 1838, to Rs. 48,614. 13a. 6p., the balance of the account then adjusted and settled; and thirdly, that the *Zemindar*, the late Husband of the Widow, died possessed of no property available for any purpose, save and except the estate in dispute, which at his death was not unincumbered.

The decree of the High Court, made on appeal from this judgment, declared that the right of the Crown to take by escheat was not defeated by the *Razenamah*; that from the death of the *Zemindar* in 1810 up to 1813 advances were made to the Widow by the Appellant's Father for purposes for which, according to the Hindoo law, the Widow would have been entitled to charge or alienate the estate as against the next heirs of the Husband, and that on the 18th of *May*, 1822, the balance due to the Widow on these advances, with interest, was about Rs. 20,000; that in the year 1828 a further advance of Rs. 1,033. 3a. 3p. was made for similar purposes; and that when the before-mentioned advances were respectively made, the Widow had not other estates of her Husband sufficient to answer the purposes for which they were taken, and to which they were applied; but that the Defendant had not shown what, at the date of the advances last mentioned, was the debt on the former advances, or whether such former debt, or any part of it, still subsisted; that no advances were made from that date to the date of the mortgage deed in 1838; and it lay upon the Appellant to show, and that he had failed to show, that the Widow was in debt to his Father at the date of the execution of the mortgage deed for advances made for the purposes aforesaid; and that accordingly the



Respondent, on the part of the Government, was entitled to take the estate by escheat, unincumbered with charges created in favour of the Appellant or his Father.

Against this decree the present appeal has been brought; and their Lordships have now only to inquire what facts must be taken to have been proved on the trial of the issues directed by Her Majesty's Order in Council of the 6th of *January*, 1862, and what conclusions ought to be deduced from them.

That the *Zemindar*, the Husband of the Widow, died in debt, and left little or nothing except the *Zemindary* in question, is undisputed. There is, therefore, no contest as to the correctness of the conclusion to which both the Courts below have come upon the last issue. It seems to be also admitted that the gross annual revenue of the *Zemindary* was, on the average, little, if at all, in excess of Rs. 10,000, that the *Peishcush*, or Government revenue, was upwards of Rs. 4,000, and that the balance was not much more than would cover the *Zemindary*, and other expenditure of the Widow. The probability, therefore, of her getting out of debt, if she ever found herself in debt to a considerable amount, was exceedingly small.

Again, it is proved, that the pecuniary transactions between the late *Zemindar* and the Uncle and Father of the Appellant (who were first cousins of his Wife), began before the year 1804. This is shown by Exhibit No. XIII. which both the Courts below have treated as genuine, and from which they have, as their Lordships think, legitimately inferred that the statements in Exhibit, No. XIV. (also found to be genuine) may be accepted as true. If this be so, we have it established

1867.

CAVALY  
VENCATA  
NARRAINA-  
PAH

THE COLLEC-  
TOR OF MA-  
SULIPATAM.

1867.

CAVALY  
VENCATA  
NARRAINA-  
PAH  
v.  
THE COLLEC-  
TOR OF MA-  
SULIPATAM.

that in 1810, when the Widow came into possession, her late Husband was indebted to the Appellant's Uncle, *Kavali Seethiah*, in a sum exceeding Rs. 20,200, and that she had to borrow from him a further sum amounting to about Rs. 3,200, in order to defray the expenses of her Husband's obsequies, and perhaps also for other purposes. That the debt so due to *Kavali Seethiah* was transferred to the Respondent's Father on the 15th of *April*, 1811, is proved by Exhibit, No. XVI.

It is unnecessary to consider, whether the debt thus assigned included any further sums paid for *Peishcush*, as the Appellant would infer from Exhibits, No. XV. and No. XVII., because the Courts below have, as their Lordships think, correctly held, that effect must be given to the Widow's admission, contained in her Letter (No. XVIII.) of the 18th of *May*, 1822; that at that date the debts on her own showing did not exceed the sum therein mentioned, a sum which this Letter states to be about Rs. 20,000, but which according to the printed record is Rs. 22,000. The antecedent proof, in the absence of any evidence to the contrary, is, their Lordships think, sufficient to establish that the whole of that sum represented debts which the Widow was entitled to charge upon the *Zemindary* as against the heirs of her Husband. The High Court has held, that the only other advance established to their satisfaction is that of Rs. 1,033. 3a. 3p. paid for *Peishcush* in 1828. And their Lordships will accept that finding as correct, though there is undoubtedly some evidence of other advances of the like nature.

This being so, the determination of this appeal must turn on the question, whether the High Court



was right in holding, that it lay on the Appellant to show, by positive proof, what part (if any) of these debts remained unpaid in 1838, at the date of the mortgage, and that, in the absence of such proof, it was to be inferred that no part of these debts subsisting in 1822 or in 1828 was subsisting in 1838.

The Appellant had, no doubt, to sustain an extraordinary burthen of proof. He had to establish not only that he had a charge on the estate by the act of the Widow, but that the debt charged was of a particular character. He has shown that such a debt once existed. It does not, however, follow that because the Respondent had the right to demand this peculiar proof, the ordinary rule, which requires the party who alleges payment to prove payment, is to be inverted in his favour, or that the debt is to be presumed to be satisfied unless the contrary is shown by the Creditor. If, indeed, the facts had shown a strong probability of the satisfaction of the debt by the proper application of the surplus revenues of the estate by the Widow, the High Court might have been justified in pressing against the Appellant the non-production of accounts, or of other satisfactory proof that the debt had not been so satisfied. They might legitimately have held, that the facts establishing that probability afforded *primâ facie* evidence of payment. But to their Lordships, it appears, that the facts proved are such as fairly lead to the opposite conclusion.

The Widow is shown to have succeeded to the *Zemindary*, encumbered with debts which she had no means of discharging, except the income, that is admitted to have been in ordinary years little more than sufficient to pay the Government revenue, and

1867.

CAVALY  
VENCATA  
NARRAIN-  
APAH

7/.

THE COLLEC-  
TOR OF MA-  
SULIPATAM.

1867.

CAVALY  
VENCATA  
NARRAIN-  
APAH

7.

THE COLLEC-  
TOR OF MA-  
SULIPATAM.

provide for the expenses of her establishment and family. A landholder, whether male or female, when in such circumstances, rarely, very rarely in *India*, succeeds in getting out of debt. Again, in the present case, the *Zillah* Judge has shown that more than one of the years, in the course of which the process of payments is assumed to have taken place, were years of distress and famine, when the collections from the estate must have fallen short of the Government revenue. And there is also evidence of occasional litigation, in which the Widow had to defend her title against adverse Claimants. She seems to have been throughout her tenure of the estate a needy and embarrassed woman. Nor can their Lordships find reasonable grounds for assuming that, between the years 1822 and 1838, she was in a condition to make payments in excess of those which, from the account said to have been settled in 1838, it must be inferred that she had then made on account of interest.

The transaction of 1838, is on the face of it a settlement of accounts between the Widow and her Creditor; a balance struck; and a mortgage taken to secure that balance. It is treated by the Respondent as a mere contrivance to give the estate to the Appellant's family in accordance with the desire which the Widow's correspondence with Government shows she had expressed in 1832. There might be good grounds for so treating it, if the other evidence in the cause was in favour of the conclusion that she had then discharged the whole of the debts of Rs. 22,000, and Rs. 1,033. But their Lordships have already stated, that they cannot draw that conclusion from the evidence.



They think that the burthen of proof, that this settlement of accounts was not a *boná fide* transaction between the Debtor and the Creditor, lies on the Respondent, and that he has failed to adduce any evidence to that effect. Assuming it then to have been a *boná fide* transaction, it follows, that advances with which she was entitled to charge the estate as against her Husband's heirs had previously been made to her to the amount of Rs. 21,000 or Rs. 23,000; and that there is no sufficient proof that she had then paid off these debts. What, then, is the effect of the transaction? Those advances, with the interest thereon, would considerably exceed the sum secured by the mortgage. Their Lordships think, that it is a fair and just inference to take this sum of Rs. 48,614. 13s. 6p., which was secured by the mortgage, to be the balance due in respect of such advances after giving credit for all payments on account, and after deducting the Rs. 5,000, paid at the time of the settlement. If it be urged that the Appellant's case assumes other advances which the Courts below have not found to be of the character required, the answer is, that in a case like this, wherein both Debtor and Creditor were interested in appropriating the payments so as to make this balance a charge upon the estate, the transaction itself, which could only be valid in the event of appropriating the payments made towards discharge of advances which could not constitute a charge upon the estate, may reasonably be treated as evidence that such an appropriation was made. Their Lordships, therefore, are of opinion, that the Appellant has succeeded in establishing that, under the mortgage of 1838, his Father acquired a charge on the estate for the sum therein

1867.

CAVALY  
VENCATA  
NARRAIN-  
APAH

v.

THE COLLEC-  
TOR OF MA-  
SULIPATAM.

1867.

CAVALY  
VENKATA  
NARRAIN-  
APAH

v.

THE COLLEC-  
TOR OF MA-  
SULIPATAM.

named, which, on the Widow's death, would have been valid against the next heirs of the Husband, if such there had been.

Further than this their Lordships are not prepared to go. They do not agree with the finding of the *Zillah* Judge, that the title of the Crown was absolutely defeated by the *Razenamah* of the 5th of *April*, 1841. They do not think that the Crown is bound by that document, or by the judgment of the 20th of *March*, 1839, on which it was founded.

The result is, that their Lordships must humbly recommend Her Majesty to reverse the decree of the High Court, and to declare, that on the 20th of *April*, 1838, there was due from the Widow to the Father of the Appellant in respect of advances for which she would have been entitled to alienate the estate, as against the next heirs of her Husband, if such there had been, the sum of Rs. 48,611. 13a. 6p.; that that sum was duly charged upon the estate by the mortgage of the 20th of *April*, 1838, and that accordingly the Appellant is now entitled to hold the *Zemindary* against the Crown as a security for so much of the said sum and of the interest thereon as now remains unpaid. This declaration is fatal to the Respondent's claim to immediate possession of the *Zemindary*; but it will leave an equity of redemption in the Crown. In strictness the present suit should stand dismissed, leaving the Crown to assert that equity, if it shall be so minded, in a suit properly framed for that purpose. It has, however, been suggested at the Bar that provision for redemption might be made in this suit. If the parties can agree as to the terms of redemption, their Lordships would not be unwilling to have them embodied in the Order



to be made on this appeal. But if they do not so agree, the Order which their Lordships must recommend to Her Majesty, as the consequence of the before-mentioned declaration is, that the Respondent's suit stand dismissed, without prejudice to the right of the Crown to redeem.

The Appellant is entitled to have the costs of this appeal and of the proceedings in the Courts below under Her Majesty's Order in Council of *January*, 1862, and the general cost of the suit below, except such portion of them as was occasioned by his contesting the title of the Crown to take by escheat. This latter portion ought to be borne by him, and unless already paid, should be set off in the usual manner. The apportionment of these costs will be dealt with by the Court below in *India*.

By an Order in Council made on the appeal, it was thereby ordered, that the decree of the High Court of Judicature at *Madras* of the 22nd *January*, 1866, be and the same is hereby reversed, and that it be, and it hereby is declared, that on the 20th of *April*, 1838, there was due from the Widow to the Father of the Appellant, in respect of advances for which she would have been entitled to alienate the estate as against the next heirs of her Husband, if such there had been, the sum of Rs. 48,611. 13a. 6p., that that sum was duly charged upon the estate by the mortgage of the 20th of *April*, 1838, and that accordingly, the Appellant is now entitled to hold the *Zemindary* against the Crown as a security for so much of the said sum and of the interest thereon as now remains unpaid, and Her Majesty is further pleased to order, and it is hereby ordered, as the

1867.  
CAVALY  
VENCATA  
NARRAIN-  
APAH  
v.  
THE COLLEC-  
TOR OF MA-  
SULIPATAM.

1867.

CAVALY  
VENCATA  
NARRAIN-

APAH

v.

THE COLLEC-  
TOR OF MA-  
SULIPATAM.

consequence of the foregoing declaration, that the suit of the Respondent do stand dismissed, without prejudice to the right of the Crown (if it shall so think fit) to assert its equity of redemption in a suit properly framed for that purpose, and the costs of this appeal, as well as the general costs of the suit below, are to be awarded in compliance with the terms of the Report.

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# AN INDEX

## TO THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

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### ACCOUNT.

*See* "BOND."

### AMENDING PETITION OF APPEAL.

*See* "APPEAL," 1, 2.

### ALIENATION.

1. Achilless Hindoo Widow has no power to alienate movable and immovable estate of her Husband. [*Mussumat Thakoor Deyhee v. Rai Baluk Ram*] ... .. 139
2. By the *Benares* school of Hindoo Law, no part of the Husband's estate forms part of his Widow's *Stridhun*, and she has no power to alienate the estate she succeeds to on her Husband's death, to the prejudice of his heirs, which on her death devolves on them. [*Bhugwandeem Doobey v. Myna Baee*] 487
3. If advances are necessary to save the estate, a Hindoo Widow can charge her Husband's estate, without his heirs' consent. [*Cavalv Venkata Narrainapah v. The Collector of Masutipatam*] ... 619

### APPEAL.

1. A petition for special leave to appeal contained a general statement of the proceedings in *India*, and an averment, that they were irregular and contrary to law. Such petition ordered to be dismissed, or to stand over for amendment, as being too general and vague. [*Goree Monee Dossee v. Juggut Indro Narain Chowdry*] 1
2. Special leave to appeal was granted *ex parte*. The Appellant made only two of the parties to the suit Respondents. On application by another party to the suit, whose interest was affected by the appeal, the original Petition for leave to appeal was ordered to be amended, and the party applying made a Respondent. [*Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*] ... .. 517
3. When the appeal involves only question of fact. Rule of the Privy Council in such a case. [*Wise v. Sunduloonissa Chowdranee*] 177  
*See* "EVIDENCE," 3, 4, 5.

## ARREARS OF REVENUE.

See "MORTGAGE,"

## ATTACHMENT.

See "HINDOO LAW," 3.

## ATTORNEY, POWER OF.

By a Hindoo *feme covert* must be strictly proved. [ *Seetul Pershad v. Mussumat Doolhin Badam Kontour* ] ... .. 268

See "EVIDENCE," 6.

## AUCTION PURCHASER.

See "HINDOO LAW," 3.

## BENAMEE.

1. A. purchased a *Talook* at a sale, in execution of a decree obtained by a judgment creditor. The Assignee of another judgment-creditor, who had obtained a decree in a separate suit against the estate, brought a suit against the purchaser to set aside the sale, on the ground that the purchase was not *bonâ fide*, being made in collusion with the judgment-debtors. Held, on a review of the evidence, that there was not sufficient evidence to warrant the decree of the High Court at *Calcutta* that it was a *Benamée* transaction ; or that the purchaser was acting as an Agent for the judgment-debtors ; and the decree of the Court below reversed.

Held further, that the *onus probandi* was on the Plaintiff to establish the affirmative issue that the money for the purchase of the *Talook* was supplied by the judg-

ment-debtors, or a third party for them, and not by the purchaser. Evidence showing circumstances which may create suspicion is not enough to justify the Court making a decree resting on suspicion only. [ *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* ] ... 28

2. Although the habit of holding land *Benamée* is prevalent in *India*, such fact does not justify the Court in making every presumption of such holding against apparent ownership. [ *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* ]

551

## BENARES

## SCHOOL OF HINDOO LAW.

See "HINDOO LAW," 2, 5, 6.

## BOND.

1. In a suit to recover the amount of principal and interest due upon two several Bonds, one of which alone was forthcoming, the other being referred to and vouched by a note of hand of the Obligor, the issues settled and recorded by the Court below for trial were, first, whether the first Bond was the deed of the deceased Obligor, and, secondly, whether the note of hand was under the seal of the Obligor, and if so, whether it was a valid acknowledgment of the debt claimed on the second Bond, and up to what time and at what rate interest was due. The Court below, notwithstanding that the first Bond actually proved purported to have been given on an



account settled, allowed evidence of the accounts and dealings between the Obligor and Obligees previous to the execution of both Bonds, and having referred the same to an Accountant, repudiated the Bonds, but decreed the Plaintiffs entitled to a considerable sum, with interest upon the account thus taken :—Held on appeal by the Judicial Committee, that the Courts below had miscarried, first, in allowing the opening of and founding the decrees upon settled accounts, the only question upon the issues recorded for their judgment being the validity of both Bonds, of which they were satisfied, and secondly, that from the frame of the issues neither the Obligees nor their representatives were bound to prove the consideration for the Bonds, but were entitled to recover the whole principal and interest due thereon, which was decreed, and the decree of the Court below amended to that effect. [*Shah Koondun Lall v. Rajah Ameer Hussun Khan*] 120

2. Circumstances in which it was held, that a female whose estate was under the control of the Court of Wards was not to be considered a disqualified female, and that she had power to contract Bond debts. Where a Plaintiff sued the Obligor and other Defendants on a Bond, not affecting land, and there was an allegation in the plaint, that the Obligor had transferred the land to those Defendants to avoid judgments attaching on the land, it

was held, that there was no right of action against those Defendants, and they were improperly made parties. [*Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer*] ... 468

### BUNDHOOS.

See "HINDOO LAW," 5.

### CAUSE OF ACTION.

A suit cannot be maintained to recover a specific Company's Note when the cause of action in a former suit was the misappropriation by the same Defendant of similar Company's Notes, as such claim for the individual note might have been included in the former suit. [*Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*]... 551

### CODE OF CIVIL PROCEDURE.

1. Act No. VIII. of 1859, secs. 139-140-1, with respect to the Judge setting and recording issues in the suit to be strictly observed. [*Baboo Rewun Pershad v. Jankce Pershad*] ... 25
2. On an appeal to the High Court, that Court acting under the power conferred by section 355 of the Code of Civil Procedure (Act, No. VIII. of 1859), *ex mero motu*, called for and examined fresh witnesses :—Held, that such power should be cautiously exercised. [*Sreemanchunder Dev v. Gopaulchunder Chuckerbutty*] ... 28
3. A judgment of the Judicial Committee in 1863, held in a subsequent suit respecting the same



*Zemindary*, to operate as *res judicata*, and came within the provisions of Act, No. VIII. of 1859, sec. 2, as a suit heard and determined by a Court of competent jurisdiction. [*Srimut Rajah Mootoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar, Zemindar of Shivagunga*] ... 50

4. The provisions of the Code of Civil Procedure (Act, No. VIII. of 1859, sec. 355), which requires the Judges who admit fresh evidence on an appeal, to record their reasons, though not a condition precedent to the reception of the evidence, is one that ought to be strictly complied with. [*Gunga Gobind Mundul v. The Collector of the Twenty-four Pergunnahs*] 345
5. Sec. 7 of Act, No. VIII. of 1859, provides, that if a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained. Held, on a construction of this section, first, that the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit; and secondly, that it included accidental error and involuntary omission of the subject of the new suit.

A suit cannot be maintained to recover a specific Company's Note when the cause of action in a former suit was the misappropriation by the same Defendant of

similar Company's Notes, as such claim for the individual note might have been included in the former suit. [*Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*] ... 551

## CONFISCATION

Of lands under *Ben. Reg. XI.* of 1796, for absconding to avoid process of the Criminal Court, of an undivided Hindoo family, registered in the name of one member only, is confined to the fractional share and interest of that member alone. [*Juggomohun Bukshee v. Roy Mothooranath Chowdry*] 223

## CONJUGAL RIGHTS.

See "RESTITUTION OF CONJUGAL RIGHTS."

## CONSIDERATION.

See "BOND."

## CONSTRUCTION.

Jurisdiction of Collector of the District, where the property is situate, under Act No. X. of 1859, sec. 23, with respect to rent. [*Baboo Dhunput Singh v. Gooman Singh*] 433

## CONTRACT.

See "LOAN."

## CONVERSION.

A partition, by deed, of part of estate of a joint Hindoo family, leaving the remaining part of the estate to



be afterwards divided, changes the *status* of the family, and, to the extent of the property divided, converts the joint tenancy to tenants in common. [*Appovier v. Rama Subba Aiyan*] ... 75

### COPARCENARY.

The estate which two Hindoo Widows take in their Husband's property is a joint estate.

Where a childless Hindoo dies, leaving two Widows surviving, they succeed by inheritance to their Husband's property as one estate in coparcenary, with a right of survivorship. [*Bhugwandeem Doobey v. Myna Baee*] ... 487

### COURT OF WARDS.

To entitle a female disqualified landholder, whose estate is in charge of the Court of Wards, to take advantage, by way of defence to an action brought against her, of the provisions of *Ben. Reg.*, LII. of 1803, in respect of her non-liability for Bond debts contracted by her, the course pointed out in that Regulation must be strictly followed. The provisions of *Ben. Reg.*, LII. of 1803 (extending *Ben. Reg.*, X. of 1793, to the North-Western Provinces), are identical with the former Regulation. [*Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer*] ... 468

### COWL

In Khote tenure.

See "LEASE."

### CREDITORS.

See "FRAUD," I.

### CROSS BILL.

See "EQUITY."

### CRUELTY.

See "RESTITUTION OF CONJUGAL RIGHTS."

### DAMAGES.

Suit by Lessee in *Khote* tenure against Government, claiming damages for prohibiting him from cutting Forest Trees for sale, dismissed. [*Ruttonji Edulji Shet v. The Collector of Tanna*] ... 295

### DECISIONS, &c.

(Overruled, observed upon, &c.)

1. The cases of *Gardiner v. Fell* (1 Jac. & Wal. 22) and *Freeman v. Fairlie* (1 Moore's Ind. App. Cases, 305), recognized and supported. [*Gunga Gobind Mundul v. The Collector of the Twenty-four Pergunnahs*] ... 345
2. The case of *Jan Khatoon v. Khwaja Ali Mullah* (5 *Ben. Sud. Dew. Ad. Rep.*, 240), founded upon *Ben. Reg.*, X. of 1793, followed. [*Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer*] ... 468

### DECREE

Of High Court of Judicature at *Bengal*, founded on inference and



assumed state of facts contradictory to those alleged in the plaint, reversed. [*Eshenchunder Singh v. Shamachurn Bhutto*] ... 7

### DEED OF GIFT.

See "EVIDENCE," 2.

### DELHI,

Estate of the Ex-King of.

By an Order of the Governor-General of India in Council, dated the 21st February, 1860, claims of loyal subjects of the British Government against the Ex-King of Delhi, or his estate, were to be heard and adjudicated upon by the ordinary judicial Tribunals of the British Government, with the view of the Government eventually paying such claims as might be proved, out of his estate in possession.

Under this Order, where a claim was made and was justly and fairly substantiated against the Ex-King in the investigation before the Judicial Commissioner, held, that such claim ought to have been allowed, irrespective of technical difficulties which might have attended legal proceedings against the Ex-King to recover the debt during his Sovereignty. *Lalla Narain Doss v. The estate of the Ex-King of Delhi*] ... 277

### DELIVERY

And possession of subject of gift, is necessary by the Mahomedan Law

of the *Sheah* school. [*Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*] ... 517

### DIVISION.

1. Of part of the estate of a joint Hindoo family as a partition *pro tanto*. [*Appovier v. Rama Subba Aiyar*] ... 75
2. The entry of the name of one member of a joint family, as *Lumbadar* (the party liable for the assessment of the revenue) on the Registry, being for fiscal purposes, is not *per se* sufficient evidence to establish the exclusive proprietary right of the party whose name is so registered, and the rights of co-partners *inter se* are not affected by such registration. [*Mussumat Cheetha v. Baboo Miheen Lall*] 369

See "HINDOO LAW," 1.

### DONOR AND DONEE.

See "MAHOMEDAN LAW," 4.

### EJECTMENT.

The relation of Government in respect of the Twenty-four *Pergunnahs*, as Landlord and Tenant, in a suit respecting boundaries with the Tenant and another in possession of the land, is such, that the Tenant cannot take advantage of the Government title of prescription of sixty years. [*Gunga Gobind Mundul v. The Collector of the Twenty-four Pergunnahs*] ... 345



## ENDOWMENT

For religious purposes.

See "RELIGIOUS ENDOWMENT."

## ENHANCEMENT OF RENT,

Under Act, No. X. of 1859.

See "JURISDICTION," 2.

"POTTAH."

## EQUITY.

On a Bill filed by Assignees of an Insolvent to cancel a Deed made by the Insolvent as being fraudulent and void as against Creditors, the property charged by the Deed being immovable, and the Defendants claiming a lien thereon for *bonâ fide* debts, the remedy, if any equity exists independent of the deed, is by cross Bill. [*Tareeny Churn Bonnerjee v. Maitland*] ... 317

## EQUITY OF REDEMPTION.

See "ESCHEAT."

## ESCHEAT.

A. made advances to a Hindoo Widow in possession, which were secured by a mortgage on the immovable estate of her late Husband, and the advances were applied by her to purposes for which she had power by the Hindoo law to charge or alienate her Husband's estate without his heirs' consent. Held, that A. was entitled as against the Crown, who took the estate by escheat on the death of the Widow for want of heirs, to possession of

the estate under the mortgage, as security for the amount advanced and interest, subject to the equity of redemption by the Crown.

The *onus probandi* lies on the Mortgagee to prove, first, that the charge on the estate was the act of the Widow; and, secondly, that the debt so charged was a competent act of the Widow; but the rule which throws the burthen of proof on the party who alleges payment to prove it, or that the debt is presumed to be satisfied, unless the contrary is shown by the Creditor, is not always to be strictly enforced, but is to be governed by the circumstances and probabilities of the case. [*Cavalry Vencata Narrainapah v. The Collector of Masulipatam*] ... 619

## EVIDENCE.

1. On an appeal to the High Court, that Court, acting under the power conferred by section 355 of the Code of Civil Procedure Act, No. VIII. of 1859, *ex mero motu*, called for and examined fresh witnesses. Held, that such power should be cautiously exercised, and the reasons for exercising it recorded or minuted by the High Court on the proceedings; as, first, the witnesses may be such as the parties to the suit do not wish to call; and, secondly, the new evidence may not be sufficiently extensive to satisfy the ends of justice. [*Sreemanshunder Dey v. Gopaulchunder Chuckerbutty*] 28



2. A deed of gift of immovable and movable [estate, alleged to have been executed by a Hindoo Widow, which was registered, set aside, as, without deciding that there had been conspiracy, perjury, and forgery, in respect to such deed on the part of the Grantee and others, yet that the suspicious circumstances attending its alleged execution and registration had not been removed by sufficient proof to support the affirmative issue on the Grantee, and to establish it is a genuine instrument. [*Mussumat Thakoor Deyhee v. Rai Baluk Ram*] ... .. 139
3. Although in a question of disputed fact, regarding the credit due to witnesses, irrespective of the probabilities of the case, the Appellate Court is reluctant to compare the conflicting decisions of the two Courts, and decide the case on a conflict of testimony nearly balanced by a preponderance of probabilities, yet, though the native testimony is open to suspicion, the duty of a Court of ultimate appeal is to judge from the evidence and not to infer from probabilities. [*Wise v. Sunduloonissa Chowdrance*] ... .. 177
4. Upon a question of fact depending on the effect to be given to parol evidence, and the credit due to witnesses, where the Courts in *India* have all concurred in one opinion, the Judicial Committee will not disturb the finding, unless it is clearly shown that the Courts were in error.
- The finding of the Courts in *India*—first, that there was not sufficient evidence to establish an alleged Mahomedan marriage; and, secondly, that the evidence in support of an alleged Will was unsatisfactory—affirmed on appeal. [*Mussumat Jariut-ool-Butool v. Mussumat Hoseinee Begum*] ... .. 194
5. Where the issue is one of fact only, and there has been concurrent judgments by the Courts in *India*, the Judicial Committee will not disturb such finding, unless they are satisfied that the Courts below were wrong in the conclusions they arrived at from the evidence. [*Meethun Bebee v. Busheer Khan*] ... .. 213
6. It is necessary that a Plaintiff who sets up a *Mookternamah*, purporting to have been executed by a Hindoo Widow, appointing a *Mookter* to do certain acts on her behalf, should establish such instrument by strict legal proof of its due execution. The absence of such proof is not compensated by any legitimate conclusions to be drawn from the other facts and circumstances in the case [*Seetul Pershad v. Mussumat Doolhin Badam Konwur*] ... .. 268
7. The provision of the Code of Civil Procedure (Act, No. VIII. of 1859, sec. 355), which requires the Judges who admit fresh evidence on an appeal to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought to be strictly complied with. [*Gunga*



- Gobind Mundul v. The Collector of the Twenty-four Pergunnahs*] 345
8. The entry of the name of one member of a joint family as *Lum-badar* (the party liable for the assessment of the revenue) on the Registry, being for fiscal purposes, is not *per se* sufficient evidence to establish the exclusive proprietary right of the party whose name is so registered, and the rights of co-partners *inter se* are not affected by such registration. [*Mussumat Cheetha v. Baboo Miheen Lall*] 369

### FRAUD.

1. A. by Deed of trust charged real estate to secure, among other things, to debt alleged to be due by him to his grandfather's estate, on account of sums received by him from a debtor to that estate. A. at that time was in a state of indebtedness, which occasioned his afterwards becoming an Insolvent. Such Deed, in the circumstances, held, so far as related to A.'s alleged debt, fraudulent and void as against his Creditors. [*Tareeny Churn Bonnerjee v. Maitland*] ... 317
2. In a suit by a Wife (a Mahomedan woman) against her Husband to recover the value of Company's paper, and personal estate, &c., the plaintiff alleged, that such paper, being her separate property, had been, as she lived in seclusion, indorsed and handed over by her to her Husband for the purpose of receiving the interest thereon. The defence of the Husband was, that

he had purchased such paper from his Wife, and on the indorsement and delivery had paid the full value to his Wife, who had appropriated the proceeds to her own use. Held, upon a review of the evidence, that although the Wife failed to prove affirmatively the precise case alleged by her in the plaint, the Husband was bound to show something more than the mere indorsement and delivery of the Company's paper, and that from the relations subsisting between the parties, the *onus probandi* was upon him to establish, first, that the transaction which he set up was a *bonâ fide* sale; and, second, that he gave full value for the Company's paper so received from his Wife.

Held, further, that in the absence of proof of the Husband having the means of purchasing the Company's paper, he being at the time in embarrassed circumstances, and the condition of the Wife, a secluded woman, that no purchase had taken place, and that the transaction was fraudulent as against her. [*Moon-shee Buzloor Ruheem v. Shumsoon-nissa Begum*] ... 551

### FRAUDULENT PURCHASE.

See "BENAMEE," 1.

### GIFT.

See "EVIDENCE," 2.

"MAHOMEDAN LAW," 4.



## GOVERNMENT.

Government, in cases in which it has taken upon itself, under the Order of the Governor-General of *India* in Council of the 21st *February*, 1860, to provide payments of debts, claimed against the estate of the Ex-King of *Delhi*, when such claims are barred by Regulation or Act, is entitled to the benefit of the rule of limitation barring the claim. [*Lalla Narain Doss v. The estate of the Ex-King of Delhi*] 277

See "DAMAGES."

"DELHI, ESTATE OF EX-KING OF."

"ESCHEAT."

## HINDOO LAW.

1. According to the true constitution of an undivided Hindoo family, no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property, that he has a certain definite share.

The proceeds of undivided property must be brought to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of the family. But if the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and each member has thence-

forth a definite and certain share in the estate, which he may claim to receive and enjoy in severalty, although the property itself has not been actually severed and divided.

Where, therefore, a deed of partition was made and executed by the members of an undivided family, dealing with and making actual partition of a portion of the joint estate, but leaving the remainder to be divided at a future period in the same manner; held, by the Judicial Committee (affirming the judgment of the Courts below), that such deed, being a division of right, operated as a conversion of the tenancy and a change of *status* in the family, *quoad* the property specified, changing, as it were, the joint tenancy thereof into a tenancy in common; and by operation of law making the members of the previously undivided family a divided family, in respect of such property. [*Appovier v. Rama Subba Aiyar*] ... 75

2. By the Hindoo law, as laid down in the *Benares* or Western schools, although a Widow may have power of disposing of movable property inherited from her Husband, which she has not under the law of *Bengal*, yet she is by both laws restricted from alienating any immovable property which she has so inherited; and on her death the immovable property, and the movable, if she has not otherwise disposed of it, will pass to the next heirs of her Husband. There is



no distinction with respect to such alienation between ancestral and acquired property. [*Mussumat Thakoor Deyhee v. Rai Baluk Ram*] ... .. 139

3. *Ben. Reg.*, XI. of 1796, sec. 4, provides that, after taking certain specified proceedings, the Magistrate is to order the attachment of any land or other real property held by a person charged with a criminal offence, who may evade the Magistrate's process by flight or concealment; by requiring the Collector, if the absentee be a proprietor of land or a *Sudder* Farmer, paying revenue immediately to Government, to hold the land or farm in attachment until further notice, and prescribes the measures to be taken by the Collector. Section 6 enacts that, "Should the absentee neglect to attend for a period of six months after the lands have been ordered under attachment, the Magistrate is to report the case to the Governor-General in Council, who will pass such order upon it, and upon the future disposal of the lands, as he may judge proper."

A. held a *Sudder* farm, part of Government *Khas Mehals*, paying revenue directly to Government. Although A. was the sole registered tenant, yet he was a member of a joint undivided Hindoo family. A. having been charged with a criminal offence, absconded in order to avoid the process of the *Foujdary* Court, when the Governor-General, under the provi-

sions of *Ben. Reg.*, XI. of 1796, confiscated the lands, and afterwards sold them by auction; held,—

First, that as the Regulation is highly penal, it must be strictly construed, and in the absence of any express provision for the case of joint proprietors of land, or persons jointly holding a *Sudder* farm, it could not be assumed that the Legislature intended to authorize the confiscation of any other property than the share of the absconding absentee.

Secondly, that it was not competent to the Government, under that Regulation, in the circumstances of the property being held by members of a joint undivided Hindoo family, to sell more than the fractional share and interest of the delinquent absentee, and that the fact of the lands being registered in the sole name of A. made no difference.

Thirdly, that a sale under Regulation XI., of 1796, does not carry with it the consequences of a sale for arrears of public revenue, by sweeping away all sub-tenures or incumbrances made by the defaulter. [*Juggomohun Bukshee v. Roy Mothooranath Chowdry*] 223

4. Where an estate was originally ancestral, belonging to a joint and undivided Hindoo family, the presumption of law being, that a family once joint retains that *status*, can only be rebutted by evidence of partition, or acts of separation; and the *onus probandi*



lies on the party who claims a share in such estate to prove that it is a divided family.

The entry of the name of one member of a joint family, as *Lumbadar* (the party liable for the assessment of the revenue) on the Registry, being for fiscal purposes, is not *per se* sufficient evidence to establish the exclusive proprietary right of the party whose name is so registered, and the rights of co-partners *inter se* are not affected by such registration. [*Mussumat Cheetha v. Baboo Miheen Lall*]

369

5. According to the *Benares* school of Hindoo law prevailing in the *Mithila* country, a Sister's son, in the absence of lineal heirs, has no title to succeed as heir to his deceased Uncle's ancestral estate.

Suit by a Sister's son against his Uncle's Widow to set aside an adoption made by the Widow to her deceased Husband. Held, reversing the decree of the *Sudder Dewanny Adawlut* at *Agra*, that, as Sister's son, he had no *locus standi* to sue as reversionary heir for his deceased Uncle's estate, or to challenge the Widow's adoption. [*Thakoorain Sahiba v. Mohun Lall*] 386; [*Mussumat Mooneea v. Dhurma*] ... 393

6. By the Hindoo law prevailing in *Benares* (the Western school) no part of the Husband's estate, movable or immovable, forms portion of his Widow's *Stridhun*, and she has no power to alienate the estate inherited from her Husband, to

the prejudice of his heirs, which, at her death, devolves on them.

The estate which two Hindoo Widows take in their Husband's property is a joint estate.

Where a childless Hindoo dies, leaving two Widows surviving, they succeed by inheritance to their Husband's property as one estate in coparcenary, with a right of survivorship; and there can be no alienation or testamentary gift by one Widow without the concurrence of the other.

One of two Widows died, having made a testamentary disposition, whereby she gave the moiety of her Husband's estate, which she had been put in possession of, to her Father and Brother. In a suit brought by the surviving Widow to recover the moiety, held, that the surviving Widow was entitled to the share of the deceased Widow. [*Bhugwandeem Doobey v. Myna Baee*] ... 487

## HUSBAND AND WIFE.

See "FRAUD," 2.

"RESTITUTION OF CONJUGAL RIGHTS."

## ILLEGITIMACY.

See "MAHOMEDAN LAW," 1.

## INHERITANCE.

See "HINDOO LAW," 5, 6.

"MAHOMEDAN LAW," *passim*.



## INTEREST.

Voluntary payment of larger amount than stipulated on the loan, effect of. [*Guthrie v. Lister*] ... 129

See "LOAN."

## ISSUES.

See "RECORDING ISSUES."

## JOINT HINDOO FAMILY.

See "HINDOO LAW," 1, 3, 4.

## JUDGMENT CREDITOR.

See "BENAMEE," 1.

"PURCHASER."

## JURISDICTION.

1. A claim of a Creditor against the King of *Delhi* during his sovereignty was rejected as barred for want of jurisdiction and exemption of the King. After he was deposed, and a new claim brought before the Judicial Commissioner, under Order in Council of the 21st *February*, 1860, it was held, that the Regulations of Limitation did not apply in the circumstances of the position of the Ex-King. [*Lalla Narain Doss v. The estate of the Ex-King of Delhi*] ... 277
2. Section 23rd of Act, No. X. of 1859, confers on the Collector of the District where the property is situate, jurisdiction in all suits, whether they be for the determination of the rate of rent at which a *Pottah* or *Kabooleat*

should be given, or for arrears of rent due on account of land.

[*Baboo Dhunput Singh v. Gooman Singh*] ... 433

3. A suit for restitution of conjugal rights will lie in a Civil Court by a Mahomedan Husband to enforce his marital rights. [*Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*] ... 551

## KHAS MAHAL.

(Twenty-four Pergunnahs.)

See "LIMITATION OF SUITS," 2.

## LANDLORD AND TENANT.

See "EJECTMENT."

"JURISDICTION," 2.

"LIMITATION OF SUITS," 2.

"POTTAH."

## LEASE.

Held, upon the construction of a Government *Cowl* in *Khote* tenure, (lease for a limited period for the purpose of cultivation) of a large tract of swamp land, in the Island of *Salsette*, in *Bombay*, on which were forest trees, that the lessee could only cut trees growing on the lands demised for the purpose of clearance and cultivation, or for repairs, and that he had no right to fell and carry away for sale unassessed forest timber growing on the demised lands.

Suit by lessee against Government, claiming damages for prohibiting

him from cutting forest trees for sale, dismissed. [*Ruttonji Edulji Shet v. The Collector of Tanna*] 295

### LEGITIMACY.

See "MAHOMEDAN LAW," 1, 2.

### LESSOR AND LESSEE.

See "LEASE."

### LIEN.

See "MORTGAGE."

### LIMITATION,

Words of.

See "POTTAH."

Of Action.

See "CODE OF CIVIL PROCEDURE," 5.

### LIMITATION OF SUITS.

1. Government, in cases in which it takes upon itself to provide payment of debts claimed against the estate of the Ex-King of *Delhi*, when such claims are barred by Regulation or Act, is entitled to the benefit of the rule of limitation barring the claim; but,

*Semble*.—The Regulation of Limitation does not apply in the circumstances of the position of the Ex-King, where a suitor had been denied justice under a plea of jurisdiction and exemption. [*Lalla Narain Doss v. The estate of the Ex-King of Delhi*]... 277

2. Where the claim to land in the Twenty-four *Pergunnahs* in possession of another, is barred by the twelve years' prescription, pro-

vided by *Ben. Reg.*, III. of 1793, sec. 14, his title is extinguished, and although a party to a suit in which the Government claims the land, he cannot avail himself of the Government's right of prescription of sixty years to resume and assess the land, on the footing of the relation of Landlord and Tenant between himself and the Government. So held by the Judicial Committee, reversing the decree of the High Court at *Calcutta*, in an ejectment suit instituted by Government for the possession of lands situate in the Twenty-four *Pergunnahs*, alleged to be held by *Mal* and not *Lak-hiraj* tenure. [*Gunga Gobind Mundul v. The Collector of the Twenty-four Pergunnahs*] ... 345

### LINEAL DESCENDANTS.

A Sister's son has no *locus standi* to bring a suit against the Tenant for life in possession. [*Thakoorain Sahiba v. Mohun Lall*] 386

### LOAN.

A. advanced to B., his son-in-law, two sums of money for the purpose of trade. These advances were secured by promissory notes, by which B. agreed to repay the loans in three years, with interest at five per cent. B. paid in his lifetime, and debited himself in his account with interest upon these loans at the rate of eight per cent. There was, however, no fresh agreement as to



such increased rate of interest, nor did *A.* press for it. At *B.*'s death *A.* claimed against his estate the principal sum due, with eight per cent. interest. Held (reversing the decree of the High Court of *Calcutta*), that although *B.* had voluntarily debited himself in his accounts with interest at the rate of eight per cent., yet the legal relation created by the promissory notes was a contract to pay five per cent. on the money borrowed, and the voluntary payment of eight per cent. without consideration, did not constitute a new contract so as to bind his estate with the payment of eight per cent. [*Guthrie v. Lister*] 129

### MAHOMEDAN LAW.

1. According to the Mahomedan law, the presumption of legitimacy from marriage, follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the Husband's child: but this presumption is not ante-dated by relation. An ante-nuptial child is illegitimate; a child born out of wedlock is illegitimate, but if acknowledged by the Father, he acquires the *status* of legitimacy. Such acknowledgment may be express or implied, directly proved or presumed.

By the same law, the denial of a son either of *Nikalee* (regular), or *Mootahar* (irregular) marriage after an established acknowledgment, is untenable, though supported by a

deed of disclaimer and repudiation by the Father.

Suit by the Son and Daughter of *A.*, a Mahomedan of the *Sheah* sect, claiming as his sole heirs, for a declaration of the illegitimacy of *B.*, who claimed to be also a son of *A.*, and co-heir, as the issue of a *Moottah*, or inferior marriage, and as having been acknowledged by *A.* in his lifetime as his son. Such marriage not having been proved to have taken place previous to the birth of *B.*, and the acknowledgment of the sonship not being satisfactorily proved, held, by the Judicial Committee, reversing the decision of the Court of the Judicial Commissioner of *Oude*, that *B.* was not entitled to any share of the property of *A.*, notwithstanding that he had been put in possession of a third by a decree in a summary suit for the administration of *A.*'s estate.

Held, also, that the *onus* of proof of his illegitimacy was upon the Plaintiffs in such subsequent suit. [*Ashrufood Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan*] ... 94

2. A *nicha* marriage between a Mahomedan and a woman of inferior station, and the legitimacy of the child of such marriage established. The *Sudder* Court discredited the evidence in favour of such marriage (which the Principal *Sudder Ameen* believed), and without taking the direct testimony upon that fact into consideration, inferred from the probabilities of the



case that no such marriage had taken place. Held, by the Judicial Committee, reversing such decree, that although in a question of disputed fact regarding the credit due to witnesses, irrespective of the probabilities of the case, the appellate Court is reluctant to compare the conflicting decisions of the two Courts, and decide the case on a conflict of testimony nearly balanced by a preponderance of probabilities, yet that, in the circumstances, though the native testimony was open to suspicion, the duty of the Court of ultimate appeal was to judge from the evidence, and not to infer from probabilities. [*Wise v. Sunduloonissa Chowdranee*] ... 177

3. A Mahomedan cohabited for many years with a Mahomedan woman who had been a prostitute and who lived in his house. At his death she claimed to be his Wife, and called witnesses to prove an actual marriage, but which fact she failed to establish. Held, that the Court of last resort could not presume, in such circumstances, that a woman, once a Concubine, had, merely by lapse of time and propriety of conduct, become a wife, and that the ordinary legal presumption was, that there had been no marriage. [*Mussumat Fariutool-Butool v. Mussumat Hoseinee Begum*] ... 194
4. A gift *inter vivos* of Government promissory Notes, negotiable securities, by a Father to his only Son (Mahomedans of the *Sheah* sect),

accompanied by delivery of possession, and a transfer into the Son's name, without any reservation of the dominion over the *corpus* by the Donor, except a stipulation for the right to the accruing interest on the Notes during the Donor's life, to be applied by him to certain religious and charitable purposes, is a valid gift by the Mahomedan law of the *Sheah* school, and creates a trust on the Donee to pay the interest to the Donor during his life.

Whether the non-assent of the heirs vitiates a Will of a Mahomedan made in favour of one heir to the prejudice of the other heirs. *Quære?* [*Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*]

517

5. A suit for restitution of conjugal rights will lie in a Civil Court by a Mahomedan Husband to enforce his marital rights.

By the Mahomedan law, such a suit is in the nature of a suit for specific performance, being founded on a contract of marriage, the Mahomedan law regarding it as a civil Contract, and the Court will enforce all the obligations which flow from such contract.

If, however, there be cruelty to a degree rendering it unsafe for the Wife to return to her Husband's dominion, the Court will refuse to send her back to his House; so also, if there be a gross failure by the Husband of the performance of obligations which the marriage contract imposes on him for the



benefit of the Wife, it affords sufficient ground for refusing him relief in such a suit. [*Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*] ... .. 551

## MARRIAGE.

See "MAHOMEDAN LAW," 1, 2, 3, 5.

"FRAUD," 2.

## MITHELA LAW.

See "HINDOO LAW," 2, 5.

## MOCURRERY.

See "POTTAH"

## MOHUNT.

See "RELIGIOUS ENDOWMENT."

## MOOKTERNAMAH.

See "EVIDENCE," 6.

## MORTGAGE.

Section 9 of Act, No. I. of 1845, enacts, that Collectors shall, at any time before sunset of the latest day of payment, receive as a deposit from any party, not being a proprietor of the estate in arrear, the amount of the revenue due from it, to be carried to the credit of the said estate at sunset aforesaid, unless before that time the arrear shall have been liquidated by a proprietor of the estate. And in case the party depositing, whose money shall have been

credited to the estate as aforesaid, shall prove, before a competent Civil Court, that the deposit was made in order to protect an interest of the said party, which would have been endangered or damaged by the sale of the estate, he shall be entitled to recover the amount of the deposit, with interest, from the proprietor of the said estate. Held, upon a construction of this section, that it only gave a personal right of action against the proprietor, and did not create a lien on the estate.

A. mortgaged his estate to B. The Mortgagor died, leaving a childless Widow his heir. A. had children, living, at his death, by a former deceased wife. The widow of the mortgagor, who was in possession, let the estate fall into arrears for Government revenue, when the representative of the mortgagee, in order to save the estate from public sale, paid the arrears. The Mortgagee's representative afterwards brought a suit against the widow to recover the amount so paid, which suit did not raise any claim against the estate itself, but sought only to make the Widow personally liable, and a decree was obtained against her to that effect. When execution of the decree was sought to be enforced against the widow, by sale of the estate, the mortgagor's contingent reversioners intervened, and the Court held that execution could not issue against the estate of the Mortgagor, which was not liable. A



supplemental suit was then brought by the Mortgagee's representative, to recover the amount of the decree so obtained, with interest, and for sale of the estate. The High Court held, upon the construction of the 9th section of the Act, No. I. of 1845, that the action to enforce the decree was confined to the Widow's interest in her husband's estate, which estate could not be sold.

Upon appeal the Judicial Committee, in affirming the judgment, held, that the decree so obtained against the widow in possession, could only be enforced against her property in respect of such interest in her deceased Husband's estate as she possessed.

Held, further, that there were two courses open to the Mortgagee's representative, first, to have instituted a suit to enforce the mortgage, and to tack to the mortgage the amount of the arrears of revenue paid to save the estate, and for a sale; or, secondly, to have proceeded under the 9th section of the Act, No I. of 1845, in a personal action. [*Nugenderchunder Ghose v. Sreemutty Kaminee Dossee*]  
241

See "ESCHEAT."

#### NEW CONTRACT.

See "LOAN."

#### NEW EVIDENCE,

On appeal to the High Court.

See "EVIDENCE," 1, 7.

#### NICKA MARRIAGE.

See "MAHOMEDAN LAW," 2.

#### ONUS PROBANDI.

See "BENAMEE," 1.

"ESCHEAT"

"HINDOO LAW," 4.

"MAHOMEDAN LAW," 1.

"PLEADING," 3.

"RESTITUTION OF CONJUGAL RIGHTS."

#### PARTIES.

Amendment of petition by adding a fresh party. [*Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*]... .. 517

#### PARTITION.

1. Of part of estate of an undivided Hindoo family and enjoyment in severalty. [*Appovier v. Rama Subba Aiyar*] ... .. 75
2. A summary Order made by a Judge under Act, No. XIX. of 1841, not in a suit, but on an application for immediate possession, in consequence of differences having arisen in the family, giving possession in equal moieties to two Widows, although acquiesced in by the Widows, by each taking possession of a moiety, does not amount to a partition of the estate. [*Bhugwandeem Doobey v. Myna Bae*]... .. 487

#### PLEA IN BAR.

See "CODE OF CIVIL PROCEDURE," 3, 5.



## PLEADING.

1. It is incumbent upon a party applying for special leave to appeal, to set out in the petition a full statement of the facts and legal grounds to show that there is a substantial case on the merits, and a point of law involved, proper to be determined by the appellate Court. [*Goree Monee Dossee v. Juggut Indro Narain Chowdery*] 1
2. A decree of the High Court of Judicature at *Calcutta* was founded on an assumed state of facts, contradictory to the case alleged in the plaint and of the evidence adduced in support of it; upon appeal, such decree reversed with costs. The Judicial Committee holding (1) that it was incorrect to conclude parties by inferences of fact, not only inconsistent with the allegations in the plaint, constituting the case the Defendants had to meet, but which were in reality contradictory to the case made by the Plaintiff in the Court below; and (2), that the legal conclusions deduced by the High Court were from assumed facts, which were not consistent with settled principles of law or equity. [*Eshenchunder Singh v. Shamachurn Bhutto*] 7
3. Held, that from the frame of the suit the Plaintiff could only succeed by force of his own title, and not by the infirmity or illegality of the Defendant's title. [*Greedharee Doss v. Nundokissore Doss, Mohunt*] 405
4. Although the Judicial Committee

is disposed to give a liberal construction to pleadings in Indian Courts, so as to allow every question to be raised and discussed in the suit, yet a Plaintiff cannot be entitled to relief upon facts and documents neither stated nor referred to in the pleadings. [*Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer*]... .. 468  
See "BOND," 2.

"RESTITUTION OF CONJUGAL  
RIGHTS."

## POSSESSION.

1. Where a summary suit is instituted to enforce a claim to possession of property, and the question in dispute necessarily involves the right, the Claimant ought to be directed at once to proceed in a regular suit, and not to be left to proceed under the Acts, Nos. XIX. and XX. of 1841, and X. of 1851, which do not determine the right, but only give possession to the *primâ facie* heirs. [*Ashrufood Dowlah Ahmed Hossein Khan Bahadur v. Hyder Hossein Khan*] 94
2. Under a summary Order made by a Judge under Act, No. XIX. of 1841, effect of. [*Bhugwandeem Doobey v. Myna Baee*] ... 487
3. Necessary by Mahomedan law of subject of gift. [*Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*] ... .. 517

## POTTAH.

A *Pottah* is a generic term, embracing every kind of engagement be-



tween a *Zemindar* and his tenants, or *Ryots*. If the *Pottah* does not contain the term "*Mocurrery*," or equivalent words of limitation, as "from generation to generation," it is not *prima facie* to be assumed to grant a *Mocurrery-istimrari*, or perpetual tenure, but evidence of long uninterrupted enjoyment, at a fixed unvarying rent, will supply the want of words of limitation in such *Pottah*.

Where, therefore, a *Pottah*, dated in 1792, was granted to the predecessor in title of *A.* by the predecessor in title of *B.*, addressed to him as "*Moostager*" or Farmer, without any words of limitation, and the property comprised in the *Pottah* remained in the uninterrupted possession of the Lessee and his successors at a fixed rent up to the year 1861, it was held, that such long and uninterrupted possession conferred a sufficient title to defeat the right of the then Landlord to an enhancement of rent under the provisions of Act, No. X. of 1859. [*Baboo Dhunput Singh v. Gooman Singh*] ... 433

## POWER OF ATTORNEY.

See "ATTORNEY, POWER OF."

"EVIDENCE," 6.

## PRACTICE.

1. It is incumbent upon a party applying for special leave to appeal, to set out in the petition a full statement of the facts and legal

grounds, to show that there is a substantial case on the merits, and a point of law involved, proper to be determined by the appellate Court.

On an amended petition, stating in detail the facts, and specifically showing legal grounds of objection to the decrees and Order of the Court below refusing leave to appeal, special leave to appeal was granted. [*Goree Monee Dossee v. Juggut Indro Naran Chowdery*] 1

2. Upon a question of fact depending on the effect to be given to parol evidence and the credit due to witnesses, where the Courts in India have all concurred in one opinion, the Judicial Committee will not disturb the finding, unless it is clearly shown that the Courts below were in error. [*Mussumat Jariut-ool-Butool v. Mussumat Hoseinee Begum*] ... 194
3. When the issue is one of facts only, and there has been concurrent judgments by the Courts in India, the Judicial Committee will not disturb such findings, unless they are satisfied that the Courts below were wrong in the conclusions they arrived at from the evidence. [*Meethun Bebee v. Busheer Khan*] ... 213
4. The rule of the appellate Court is, that it will not, on a question of fact, reverse an unanimous judgment of the Courts in India, unless the very clearest proof is shown that such decision is erroneous. [*Tareeny Churn Bonnerjee v. Maitland*] ... 317



5. Although the Judicial Committee is disposed to give a liberal construction to pleadings in Indian Courts, so far as to allow every question to be raised and discussed in the suit, yet a Plaintiff cannot be entitled to relief upon facts and documents neither stated nor referred to in the pleadings. [*Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer*] ... 468
6. *Semble*.—If the Court below acted wrong in its procedure under Act, No. VIII. of 1859, such miscarriage will not prevent the Judicial Committee from deciding the question omitted in the written grounds for review of judgment. [*Bhugwandeem Doobey v. Myna Baee*] ... 487
7. Special leave to appeal was granted *ex parte*. The Appellant made only two of the parties to the suit Respondents. On application by another party to the suit, whose interest was affected by the appeal, the original Petition for leave to appeal was ordered to be amended, and the party applying made a Respondent. [*Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*] ... 517

#### PRECATORY TRUST.

See "RELIGIOUS ENDOWMENT."

#### PRESCRIPTION.

See "LIMITATION OF SUITS," 2.

#### PRESUMPTION.

1. Of Legitimacy and Marriage.  
See "MAHOMEDAN LAW," 1, 2, 3.

2. Of Hindoo law is, that a family once joint retains that *status*.

See "HINDOO LAW," 4.

3. Of holding land *Benam*.

See "BENAMEE."

#### PRIOR SUIT,

To recover same *Zemindary*.

See "RES JUDICATA."

#### PROCEDURE ACT, No. XIX.

1841.

See "CODE OF PROCEDURE."

#### PROPRIETARY RIGHT.

See "EVIDENCE," 8.

#### PROMISSORY NOTES.

See "FRAUD," 2.

"LOAN."

#### PURCHASER.

A purchaser under a decree in a civil suit takes merely the right, title, and interest of the judgment Debtor, and is subject to the subsisting interests in the land which have been granted or created by any former *Zemindar*. [*Baboo Dhunput Singh v. Gooman Singh*]

433

#### RECORDING ISSUES.

In a suit raising issues of fact, it did not appear from the record transmitted from *India* that the Judge of the *Zillah* Court had, in conformity with Code of Civil Pro-



cedure (Act, No. VIII. of 1859, secs. 139, 140-1) settled or recorded the issues in the suit, although he allowed evidence in the cause to be taken. In such circumstances the Judicial Committee postponed the hearing of the appeal until a certified copy of the proceedings in the cause should be transmitted, and, in the alternative of no such issues being settled, set aside the decree of the *Sudder Dewanny* Court at *Agra*, with directions to that Court to remand the suit to the Lower Court, to be tried upon issues to be settled and recorded in conformity with the provisions of the Act, No. VIII. of 1859. [*Baboo Rewun Pershad v. Jankee Pershad*] ... 25

### REGISTRATION.

1. By one member of a joint undivided Hindoo family as sole owner of a *Sudder* Farm for fiscal purposes; effect of. [*Juggomohun Bukshee v. Roy Mothooranath Chowdry*] ... 223
2. The entry of the name of one member of a joint family, as *Lumbadar* (the party liable for the assessment of the revenue) on the Registry being for fiscal purposes, is not *per se* sufficient evidence to establish the exclusive proprietary right of the party whose name is so registered, and the rights of co-partners *inter se* are not affected by such registration. *Mussumat Cheetha v. Baboo Miheen Lall* ... 369

### RELIGIOUS ENDOWMENT.

*G. D.*, the reigning *Mohunt* of the *Mutt* or *Akra* (a religious endowed institution in *Burdwan*), made a Will, appointing *L.*, one of his Disciples, to succeed him as *Mohunt*, and to take possession of the real and personal estate belonging to the *Akra*, with a reservation that, when *L.* should find himself incapable of fulfilling the duties of the office, he should appoint one *G.*, who was specially designated by him, in *L.*'s place as *Mohunt*.

*L.* was installed as *Mohunt*, and took possession of the *Guddee* (or Throne) and estates attached to the *Akra*; and was subsequently recognized and confirmed as Superior by the Assembly of *Mohunts*. *L.*, by his Will, nominated *N.*, his successor, to the *Mohuntship*. In a suit by *G.* against *N.* for a declaration of *G.*'s reversionary right to the *Mohuntship* under the Will of *G. D.*, held:—

First, that according to the true construction of the Will of *G. D.*, there was not absolute gift to *G.* of the reversion upon *L.*'s death, or incapacity to perform the duties of the office.

Secondly, that even in the event of *L.*'s becoming incapable to perform the duties of *Mohunt*, the direction of the Testator, or Grantor, amounted at most to a precatory trust, and was not imperative upon *L.*

Whether by usage there was any power in the *Mohunt* to impose



such a restriction on his successor, to nominate a specified individual, *Quære?* [*Greedharee Doss v. Nundokissore Doss, Mohunt*] ... 405

## RENT,

Suit for enhancement of.

See "JURISDICTION," 2.

"POTTAH."

## RESERVATION

By Donor of interest arising out of subject matter of gift to the Donee. [*Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*]

517

## RES JUDICATA.

Suits were brought in 1832 to recover possession of a *Zemindary*, the principal question being, whether the *Zemindary* was a divided or undivided estate. A., one of the parties, claimed under an alleged testamentary disposition of the *Zemindar* last seized. The decisions of the Courts in *India* were against the validity of the testamentary disposition. On appeal, the Judicial Committee, in 1844, held, that the requirements of *Mad. Reg. XV. of 1816*, in recording the points at issue, had not been complied with, and that the question of division or no division had not been properly tried, and remitted the case to *India*, with liberty to bring a new suit to try that issue. Fresh suits were in consequence brought in *India*, in which the question of the genuineness of the alleged

Will was again raised, but the party claiming under that instrument rested his case on the assumption of the *Zemindary* being undivided property. These suits were also appealed to the Judicial Committee in 1863, when their Lordships held, that the question of division or no division was immaterial, as the *Zemindary* was self-acquired by the first *Zemindar*. On the hearing of this appeal A. abandoned his claim under the alleged Will. The decision of the Judicial Committee being adverse to him, he instituted a fresh suit for the purpose of establishing the Will. The Courts in *India* decided that the judgment of the Judicial Committee in 1863 operated as *res judicata*, and came within the provisions of sec. 2, Act, No. VIII. of 1859, as a suit heard and determined by a Court of competent jurisdiction. Such judgment on appeal affirmed; the Judicial Committee being of opinion, that the validity of the Will being properly at issue in the appeals in 1844 and 1863. and having been abandoned on the latter hearing, the decision was final so far as respected the Will between the parties. [*Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar, Zemindar of Shivagunga*] ... 50

## RESTITUTION OF CONJUGAL RIGHTS.

By the Mahomedan law, a suit for



restitution of conjugal rights is in the nature of a suit for specific performance, being founded on a contract of marriage, the Mahomedan law regarding it as a civil contract, and the Court will enforce all the obligations which flow from such a contract.

If, however, there be cruelty to a degree, rendering it unsafe for the Wife to return to her Husband's dominion, the Court will refuse to send her back to his house; so also, if there be a gross failure by the husband of the performance of obligations which the marriage contract imposes on him for the benefit of the Wife, it affords sufficient ground for refusing him relief in such a suit.

From the frame of the pleadings and issues, the question of cruelty set up by a Wife, in answer to a suit for restitution of conjugal rights, was not properly entered into, but in the circumstances of the conduct of the Husband towards his Wife, the Judicial Committee declined to direct the Wife to be sent back to her Husband, and remitted the cause back to the Court below for a new trial, with liberty to frame issues and take evidence as to the specific acts of cruelty. [*Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*] ... 551

#### REVENUE.

See "MORTGAGE."

"SALE."

#### REVERSIONARY INTEREST.

See "HINDOO LAW," 5.

#### REVIEW OF JUDGMENT

Upon an application for review of judgment before the *Sudder Court*, the written grounds for review impugned the correctness of the decision of the Court below, on grounds that related solely to the immovable estate, and not to the movable estate, also in a question in the suit. Held, that, notwithstanding the terms of the 378th section of the Code of Procedure (Act, No. VIII. of 1859), it was competent to the Judges, by whom the Order allowing the application for review was made, to enlarge those grounds on an oral application, by including movables, if satisfied that there was a proper case on the merits for so doing. [*Bhugwan-deen Doobey v. Myna Bacc*] 487

#### SALE.

A sale under *Ben. Reg.*, XI. of 1796, does not carry with it the consequences of a sale for arrears of revenue, by sweeping away all sub-tenures or incumbrances made by the Defaulter. [*Juggomohun Bukshee v. Roy Mothooranath Chowdry*] ... 223

See "MORTGAGE."

#### SAMANODACAS.

See "HINDOO LAW," 5.

#### SATISFACTION.

Burthen of proving that a mortgage is satisfied. [*Cavalv Vencata Nar-rainapah v. The Collector of Masu-lipatam*] ... 619



SETTLED ACCOUNTS,

Opening of.

See "BOND."

SHEAH SECT.

See "MAHOMEDAN LAW," 1, 4.

SISTER'S SON.

See "HINDOO LAW," 5.

SPECIAL LEAVE TO APPEAL.

See "APPEAL," 1, 2.

STRIDHUN.

1. The devolution of *Stridhun*, or Wife's peculiar property, from a childless widow, is regulated by the nature of her marriage. If her marriage was according to one of the four approved forms, at her death her Husband's collateral heirs succeed to it. [*Mussumat Thakoor Deyhee v. Rai Baluk Ram*]... .. 139
2. By the Hindoo Law prevailing in *Benares* (the Western school) no part of the Husband's estate, movable or immovable, forms portion of his widow's *Stridhun*. [*Bhugwandeen Doobey v. Myna Bae*]... .. 487

SUCCESSION.

The law of succession, *ab intestato*, applies only to the assets which constitute the succession. [*Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*]... .. 517

See "HINDOO LAW," *passim*.

"MAHOMEDAN LAW," 1, 2, 4.

SUMMARY SUIT

For possession under Acts, Nos. XIX. and XX. of 1841, and X. of 1851.

See "POSSESSION," 1, 2.

SUPPLEMENTAL SUIT.

A suit was brought by a Mortgagee against the Widow of the Mortgagee, who was in possession of the estate, to recover the amount of the mortgage debt, and obtained a decree against her personally. The Mortgagor's contingent reversioner resisted the sale of the mortgaged estate; a supplemental suit was then brought to recover the amount of the decree and interest, and for sale of the estate. Held, the decree so obtained against the Widow could only be enforced against her property in respect of such interest in her deceased husband's estate as she possessed. [*Nugenderchunder Ghose v. Sreemutty Kaminee Dossee*] 241

TACKING.

See "MORTGAGE."

TENANTS IN COMMON.

See "HINDOO LAW," 1.

TENURE.

See "POTTAH."

TIMBER.

Cutting and carrying away forest trees for sale.

See "LEASE."

## TRUST.

Created by a Mahomedan of the *Sheah* sect for religious and charitable purposes. [*Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*] ... 517

## TRUST DEED.

A deed by A., then in a state of indebtedness, charging real estate to secure a debt, set aside, as fraudulent and void against creditors. [*Tareeny Churn Bonnerjee v. Maitland*] ... 317

See "FRAUD," 1.

TWENTY-FOUR PERGUN-  
NAHS.

See "LIMITATION OF SUITS," 2.

UNDIVIDED HINDOO  
FAMILY.

See "HINDOO LAW," 1, 3, 4.

## USAGE.

As to the power of the reigning *Mohunt* to appoint successor. *Quære*. [*Greedharee Doss v. Nundokissore Doss, Mohunt*] ... 405

## WARD.

See "COURT OF WARDS."

## WIDOW.

Power of a Hindoo Widow to charge or alienate her Husband's estate for advances for the benefit of the estate. [*Cavalry Vencata Nar-rainapah v. The Collector of Masu-lipatam*] ... 619

See "HINDOO LAW," 6.

"STRIDHUN."

## WIFF,

(Hindoo,)

Execution of a *Mookternamah* by, must be strictly proved. [*Seetul Pershad v. Mussumat Doolhin Bada-m Konwur*] ... 268

## WILL.

1. Construction of by reigning *Mohunt* of the *Mutt*, or *Akra*, a religious endowed institution appointing successor. [*Greedharee Doss v. Nundokissore Doss, Mohunt*] 405
2. Whether the non-assent of the heirs vitiates a Will of a Mahomedan made in favour of one heir to the prejudice of the other heirs. [*Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum*] ... 517

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